Crime and Punishment in Islamic Law

A Fresh Interpretation

Mohammad Hashim Kamali

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MOHAMMAD HASHIM KAMALI

بسم الله الرحمن الرحيم

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I

Introduction

THIS BOOK ESSENTIALLY consists of a presentation of issues and reform proposals regarding the prescribed punishments of *ḥudūd* in Islamic criminal law. But the discussion is not confined to *ḥudūd* as such and also delves into other concerns relating to crimes and punishments in shariah. Two main topics are discussed in this book: first, issues that relate to presenting a holistic reading of the Qur'an and hadiths on *ḥudūd* punishments, just retaliation (*qiṣāṣ*), and the discretionary punishments of *taʿzīr*; and second, issues that are encountered in modern-day applications of Islamic criminal law. The first of these subjects, which is addressed in part one of the book, is the main preoccupation and takes up about two-thirds of this volume. Parts two and three examine the applied aspects of Islamic criminal law in a number of Muslim countries.

An overview of *ḥudūd* laws in the Muslim world today reveals many issues relating to perception. The Muslim masses tend to see *ḥudūd* laws and punishments as the core feature of Islam and the Islamic revivalist agenda. *Ḥudūd* laws are generally not enforced, or if they are enforced it is only selectively. Yet there is persistent debate over *ḥudūd* laws and even demand for their enforcement in many parts of the Muslim world. A number of Muslim countries and jurisdictions have consequently attempted to address *ḥudūd*-related issues, and those of Islamic criminal law generally, within their own set of possibilities and conditions. Islamic regimes that come to power as a result of a revolution or coup d'état "need to demonstrate immediately that they are making a start on the construction of a real Islamic state by implementing Islamic criminal law."[1] This

book attempts to present a picture of these developments, insofar as the present writer was able to construct this view within limitations on securing accurate information about sensitive religious issues. Obtaining accurate information presents a difficulty due to prevailing uncertainties over ascertaining true positions. *Ḥudūd* laws have become increasingly politicised, and thus politicians often skirt around religious issues just as they also stop short at exploring the jurisprudential dimensions of punishments. The reticence of politicians may also be due to their wish to not heighten concerns of non-Muslim segments of their populations. This has often meant that issues do not find effective responses, which is why it seems there are continuing debates about *ḥudūd* in many Muslim countries, some running over decades, without the emergence of clear responses. Misunderstanding and uncertainties tend to linger on; critics would even say, in Malaysia for instance, that debates on *ḥudūd* laws are kept on the back burner until election time, when they are revived because it is politically convenient. Juristic attitudes toward *ḥudūd* laws are also heavily influenced by the view that *ḥudūd* laws are determined by clear injunctions in the Qur'an and are therefore not amenable to juristic reconstruction and *ijtihād*. All of this has helped *ḥudūd* laws to remain as a mainstay of imitative scholarship (*taqlīd*) such that even leading schools of law have balked at exercising original thinking and *ijtihād* over them. The issues at hand are longstanding and demand a blended approach that is informed by relevant factors, even venturing outside the jurisprudential aspects of a subject if the quest for relevant answers is to be meaningful and to advance out of the prevailing impasse over Islamic criminal laws in the Muslim world.

Muslim countries and jurisdictions have generally shied away from the enforcement of *ḥudūd* punishments due to their apparent severity. Yet because of public sensitivities and politicisation of the subject, parliamentarians, judges, and jurists have also not shown a willingness to depart from hallowed precedents in favour of a fresh and holistic understanding of Qur'anic dispensations on *ḥudūd*. This naturally makes the challenge of adjustment and reform even more difficult to address.

That said, the main thrust of this book is to offer a fresh interpretation of the sources of shariah on the key issues discussed herein and to show how the Qur'an and Sunnah can open a path to possible reform of Islamic criminal law. It hardly needs to be emphasised that a receptive climate of opinion should exist on the part of religious and political leaders to *ijtihād*-based responses over issues. To those who take a position that *ijtihād* does

not proceed when there is a textual injunction,[2] it may be said that one would need to understand the textual injunction in the first place before saying that it is definitive (*qaṭʿī*) and close therefore to *ijtihād*. In advancing this argument, the discussion also presents the views and contributions of prominent twentieth-century ulama and scholars on criminal law issues and attempts to integrate these views in the book's conclusions.

A discursive review and appraisal of Islamic criminal law is also called for due to the many changes in modern societies in response to the rampant tides of secularity and materialist culture of the postindustrial revolution. Globalisation and the contemporary human rights discourse have added new dimensions to the existing challenges of innovative interpretation and *ijtihād* in the twenty-first century. How Muslim countries and jurisdictions present their penal laws and procedures to protagonists of human rights is arguably a matter of concern to Islamic civilisation and its claim to universality and inclusiveness, its commitment to justice, its inner resources, and its ability to accommodate changing needs of modern societies and make necessary adjustments along the way.

Islamic criminal law has lagged behind, as already mentioned, due to the stronghold of the imitative tradition of *taqlīd*. Instead of trying to bridge the yawning gap between the law and social reality and to address the challenges, the proponents of *taqlīd* engaged in exaggerations. *Ḥudūd* laws are sometimes seen as paramount indicators of the Islamic identity of states and societies. To measure the Islamicity of a state or a community of believers by reference to a set of punishments is not only a reductionist practice but also tantamount to judging Islam by one of its unwanted elements. A good performance record of a government, Islamic or otherwise, is based on minimising criminality and the recourse to punishment. Islam stands on the Five Pillars (*arkān*),[3] and these principles do not address *ḥudūd* laws, *qiṣāṣ*, or any aspect of criminal law. Punishment of any kind is rather remote from the spiritual core of Islam, yet the general public has maintained a highly exaggerated image of *ḥudūd* punishments as a litmus test of the Islamicity of their governments. This development is largely based on long-held associations and public perceptions that call for reappraisal and adjustment.[4]

The Qur'anic outlook on punishment may be characterised by its emphasis on retribution, deterrence, and reform. This book is based on the premise that the conventional fiqh approach to formulation of the underlying meaning and philosophy of punishments does not adequately reflect the totality of Qur'anic guidance on this subject. Adding rehabilitation

and reform to the penal philosophy of *ḥudūd* is not only scripturally justified but tantamount to acknowledging that crime is not a totally isolated phenomenon and that a society increasingly becomes an unwilling partner in the rising tide of criminality and aggression. It is also important for a society to address juridical issues in their proper context to reach well-moderated responses to these concerns. Which should come first, implementing punishments or justice? And what is the higher purpose of shariah and the ultimate goals of the punishments? To ignore this ordering of priorities is one of the challenges of *ḥudūd*.

The remainder of this introductory chapter presents a summary of the various themes and chapters of the book.

The discussion in part one under "Shariah Perspectives" starts with a general characterisation of Islamic criminal law and proceeds to provide a more integrated reading of the *ḥudūd* verses in the Qur'an. This overview covers a number of reform proposals and recommendations on *ḥudūd* laws, along with just retaliation (*qiṣāṣ*) and discretionary punishments. These issues can be appraised and adjusted in line with the broader outlook of the Qur'an on punishment, which has not been duly integrated in juristic doctrines of the various schools and scholars of earlier times. The fiqh-based discussion and analysis that follows reviews the scholastic jurisprudence of *ḥudūd* and identifies positions of the leading schools of Islamic law.

There are only four offences—namely adultery, theft, slanderous accusation, and banditry/terrorism—for which the Qur'an has prescribed punishments, and in none of the relevant passages is there a mention of *ḥadd* or *ḥudūd* as such. The Qur'an has also not used *ḥudūd* specifically in the sense of punishment, let alone fixed and mandatory ones, for which they are typically understood today and throughout the longer history of Islamic juristic thought.

Ḥudūd Allāh (God's limits) in the Qur'an is a much broader concept, which is confined neither to punishments nor to an exclusively legal framework but can provide a comprehensive set of guidelines on moral, legal, and religious themes. Juristic thought has, however, followed a different trajectory whereby this broader view of *ḥudūd* was reduced to mean quantified, mandatory, and invariably fixed punishments. The four offences for which the Qur'an has prescribed punishments were expanded, in the fiqh presentations of *ḥudūd*, to six offences and, according to an alternative version, to seven—and this was done in the face of clear evidence that advised a minimalist rather than a maximalist approach to crimes and

punishments.[5] Additionally, whereas the Qur'an has, in all four instances where specified punishments occur, made provisions for repentance, correction, and reform (*tawbah* and *iṣlāḥ*), juristic doctrine has either left this out altogether or reduced it to a mechanical formality that can hardly be said to be reflective of the original teachings of the Qur'an, thus clearly and unequivocally opening *ḥudūd* laws to the prospect of repentance and reform.

In the works of fiqh one also notes a certain linkage between *ḥudūd* and *ḥaqq Allāh* (Right of God), on the one hand, and *ḥaqq al-ādamī* (or *ḥaqq al-ʿabd* –Right of Man) on the other. There is no Qur'anic requirement, nor an expressed justification, for these linkages. Some of the juristic particularities that originate in this scheme not only lead to inconsistencies but also contribute to a degree of regimentation in the development of juristic thought. The fiqh presentation of *ḥudūd* is marked by a tendency to move further away from the original Qur'anic emphasis on repentance/rehabilitation and reform and toward engaging in juristic technicalities.

One would not deny, of course, the reality of differentiation between private rights and public rights nor of differences between civil claims and crimes. Islamic law clearly recognises private rights, such as the right of ownership, the right to inheritance, and a wife's right to financial support, without necessarily labelling these as *ḥaqq al-ādāmī* or *ḥaqq al-ʿabd* as such. A simple distinction between civil claims and crimes is not an issue, but to refer to certain crimes as "Rights of God" is not only odd (as if God Most High wishes to be so punitive!) but also blind to the truism that in Islam all rights and obligations originate, theoretically at least, in the will and command of God. This is clearly acknowledged in the Islamic theory of ownership—which suggests that God is the true owner of all things and that human owners are only the trustees of what they own—without necessarily labelling ownership as either the "Right of God" or the "Right of Man." This is because the two sets of rights under review are almost always an extension of one another and convergent. A substantive revision of the philosophy and jurisprudence of *ḥudūd* is therefore called for, indeed necessary, simply because technicality and regimentation need to be removed or minimised to facilitate a balanced implementation of the original vision of Islamic criminal law and *ḥudūd*.

Part one also looks into issues of evidence, proof, and admissibility, with reference particularly to adultery and theft. The discussion also looks into issues pertaining to apostasy (*riddah*); slanderous accusation (*qadhf*); the punishment of theft, banditry, and terrorism (*ḥirābah*); and

consumption of alcohol (*shurb*). The main question raised concerning the latter issue, *shurb*, is whether it should be included among *ḥudūd* offences at all. Other *ḥudūd*-related issues discussed in part one concern the status of non-Muslims and the much-debated yet crucial distinction between rape and *zinā*. This is followed by views on the distinction between a married Muslim (*muḥṣan*) and one who is unmarried (*ghayr muḥṣan*), which has a bearing, in turn, on the application or otherwise of stoning (*rajm*) as a punishment.

The subsequent chapter on *ḥirābah* (terrorism) begins with various definitions that the leading schools of Islamic law, both Sunni and Shia, have given to this crime. The quest to present a more relevant reading of the Islamic law of *ḥirābah* in relation to contemporary terrorism entails a closer look at the existing evidence in fiqh, on one hand, and more recent research on terrorism on the other. Having looked into the jurisprudence of *ḥirābah* and a wider understanding of terrorism, the chapter revisits the Qur'an and attempts a fresh interpretation of its relevant passages that can tackle some of the unprecedented issues of global terrorism today.

The philosophy of *ḥudūd* punishments, which is also the subject of a chapter in part one, provides a brief entry into the three most commonly known theories of punishment in criminal law, namely retribution, deterrence, and reform. The review of the evidence shows that repentance and reform do not find a suitable place in the fiqh expositions of *ḥudūd*. One likely explanation may be that premodern penal systems were ill-equipped to integrate the Qur'anic dispensations on repentance and reform into their working modalities, hence their exclusive focus on fixed penalties and an overly punitive approach to the subject. To apply quantified punishments is a relatively facile task, one might say, for courts and enforcement agencies. Instead they should devise carefully nuanced approaches and procedures of the kind now known and practiced (e.g., probation orders, remand centres, suspended sentences, community service, etc.), in addition, that is, to custodial sentences. These approaches should be contemplated, selectively at least, in a revised theory of punishments in Islamic law.

The enquiry into evidence concerning the punishment of stoning (*rajm*) for adultery highlights differences of opinion among the leading schools of Islamic law. There are two levels of inconsistency in the evidence concerning stoning: one is that the Qur'an is totally silent on this punishment and only the Sunnah seems to have validated it; and the evidence also shows that stoning was practiced during the lifetime of the Prophet. Yet

there is uncertainty as to the chronological sequence between the rulings of the Qur'an's "100 lashes of punishment" for adultery and the Sunnah's provision on stoning. Which was revealed earlier and which later? These questions play a crucial role in determining the continued validity or otherwise of stoning as a punishment, and the answers are somewhat less than definitive. To establish a chronological sequence would bring into play the subject, in turn, of abrogation (*naskh*) and the possibility that stoning was actually replaced and abrogated by the standard Qur'anic punishment of 100 lashes for all cases of adultery and fornication for married and unmarried persons alike. Due to these issues and lingering uncertainties over them, the Kharijites and MuÒtazilah overruled the validity of stoning altogether and upheld flogging as the only punishment for *zinā*.

The majority of Islamic schools and scholars (*jumhūr*) have accepted, nevertheless, the ruling of the Sunnah to be conclusive on stoning. Yet the answers that they have given to certain questions were based on presumptions that originated in methodological guidelines pertaining either to abrogation (*naskh*) or specification of general principles (*takhṣīṣ al-ʿām*).

The second level of inconsistency that appears in the hadith reports concerning the punishment of adultery is concerned less with stoning and more on the validity or otherwise of two supplementary punishments, namely of banishment in combination with flogging for an unmarried Muslim (*ghayr muḥṣan*) offender and of flogging in combination with stoning for a married Muslim (*muḥṣan*) offender. During the Prophet's lifetime, these combinations were applied in some cases but not in others. Existing evidence in the hadith thus shows inconsistency, which has, in turn, generated considerable debate among Muslim jurists, who were evidently able to draw different conclusions from the relevant hadiths. In this connection, the majority have validated one year of banishment as a supplementary punishment to the flogging of 100 lashes for an unmarried person, though the Ḥanafīs have not approved of this punishment. This is mainly because the Ḥanafīs considered banishment to be a *taʿzīr* discretionary punishment and not an integral part of the prescribed punishment of flogging; the two cannot be combined, but the majority has held otherwise. An additional consideration is that banishment to another place is not advisable as it would expose the new community to the possibility of repetition, continued debauchery, and mischief.

An analysis of these issues and the lingering uncertainties over the punishment of adultery is then followed by an opinion survey of some of the leading twentieth- century scholars and ulama, including Muḥammad

Abū Zahrah (d. 1974), Muṣṭafā Aḥmad al-Zarqā (d. 1999), Yūsuf al-Qaraḍāwī, Muḥammad Salīm al-ʿAwā, and others who have questioned the veracity of the evidence on stoning as well as the conventional distinction between married and unmarried persons and how it is involved in determining punishment.

The discussion continues with a similar opinion survey of Muslim scholars on the implementation of *ḥudūd* generally in contemporary Muslim societies. Should the *ḥudūd* penalties be enforced as an isolated case in a legal system that originates mainly in Western thought and institutions? Ridding the Muslim world of unwanted colonial legacies was a key objective of the Islamic revivalist movement of the latter part of twentieth century and the rise of so-called political Islam. Many constitutions, civil codes, or criminal codes that are currently in force in many Muslim countries and government institutions are arguably modelled after a Western prototype and tend to be secularist in orientation. This has confronted contemporary Muslim scholars with the question as to which has the greatest priority in legal decisions: an Islamic government, shariah, or *ḥudūd*. The discussion in this part concludes with a brief analysis of a renowned hadith (i.e., legal maxim)— that *ḥudūd* must be suspended when there is doubt. This chapter also advances an argument that rampant secularity and temptations to sin generate a need to be interpreted through deeper readings of hadiths.

Whereas the core aspects of shariah are regulated by textual injunctions of the Qur'an and hadith, rulers and judges have also been granted discretionary powers under shariah principles of judicious policy (*siyāsah sharʿiyyah*) and *taʿzīr*, which allow rulers and judges to determine the best manner in which shariah can be administered. Yet the constitutional principle of legality presents a concern, in cases of both *siyāsah* and *taʿzīr,* that discretion must be carefully tailored to the purpose it is supposed to serve and must not exceed the bounds of government under the rule of law. In light of these remarks, the discussion turns to questions on exploring (1) the existence (or otherwise) of any boundaries and limits that Islamic law itself provides over the operation of *siyāsah* and *taʿzīr*; and (2) how these limits should be understood in a constitutional system of government.

The book's subsequent discussion of scholastic jurisprudence regarding just retaliation (*qiṣāṣ*), blood money, and financial compensation (*diya*) offers an overview of their contemporary applications—each in a separate chapter—that underline the issues they present in various

jurisdictions. The discussion offers suggestions as to how *qiṣāṣ* and *diya* may be adjusted and brought into harmony with the given terms of a modern constitution and legal system while maintaining harmony with the higher purposes, or *maqāṣid*, of shariah.

Whereas the prescribed *ḥudūd* punishments generally fall under the rubric of the Right of God, or public rights, *qiṣāṣ* punishments mainly follow the Right of Man (*ḥaqq al-ādamī*), which are each governed by separate rules. This binary classification of rights is clearly a juristic addition that lacks a scriptural origin, therefore it is amenable to further adjustment and *ijtihād*. This book takes the view that the role that *qiṣāṣ* and *diya* played in tribalist societies of earlier times may no longer be significant in the context of a modern legal system where a tribal structure of values is no longer present, thus suggesting parallel adjustments for their application.

More specifically, just retaliation in the Qur'an is explained against the background of pre-Islamic practices of *qiṣāṣ* and how the Qur'an injected equality and objectivity into the rubric of legal institutions. The Prophet and his Companions, especially the second caliph ʿUmar b. al-Khaṭṭāb, continued with the reform of *qiṣāṣ* law. Having reviewed the brief history and jurisprudence of *qiṣāṣ*, the chapter then advances a perspective on how the Qur'an, although recognising *qiṣāṣ* as a right primarily of the next of kin of the deceased, has placed the administration of *qiṣāṣ* entirely in the hands of rulers and judges rather than the next of kin of the deceased. Thus rulers and judges may not take revenge nor retaliate beyond the objective standards of justice.

Blood money (*diya*) features in the succeeding chapter, which highlights two separate aspects of the subject. One of these is a certain departure in the scholastic jurisprudence of fiqh from the principle of equality that finds clear expression in the Qur'an and Sunnah. The schools of law have on occasions introduced views that tend to compromise the egalitarian tenor of the Qur'anic dispensations on *diya* with respect to women and non-Muslims. Another aspect of *diya* presented in the book's treatment of this subject is how it is utilised in the modern laws of some Muslim countries with relation to traffic and work-related accidents, pensions, and life insurance.

The subject of doubts (*shubhat*) features prominently in the fiqh manuals with reference especially to *ḥudūd* punishments. A later chapter ascertains the identification and measurement of doubt and how it impacts the implementation aspects of *ḥudūd* punishments. Highlighted in this connection is the renowned hadith that mandates suspension of *ḥudūd*

in the presence of doubt. Then the discussion draws attention to a new dimension of doubt/*shubha* that modern society conditions have brought about in light of the said hadith.

The final chapter on shariah perspectives is titled "Islam as a Total System," which presents a roundup of twentieth-century Islamic scholarship on Islamic criminal law. How should shariah be understood as an integrated system? How does Islamic criminal law operate within the confines of a modern constitution and respond to issues of human rights and concerns of modern critics of *ḥudūd*? Responses to some of these questions are then offered in light of the Qur'anic directives on justice (*'adl*) and fair treatment (*iḥsān*) and the concern for accuracy in applying punishments. If human rights discourse and modern constitutional laws advance the cause of justice and better regulation of punishments, ways should be found to contextualise, selectively at least, the contemporary applications of Islamic criminal law. The country-based surveys on the applied aspects of Islamic criminal law that occupy the balance of the book are subdivided into two parts: one looks into developments in Malaysia, and the other provides an overview of developments in about fourteen other Muslim countries.

Part two, "*Ḥudūd* in Malaysia," provides a detailed coverage of the *ḥudūd* debate in Malaysia, focusing mainly on a reading of two *Ḥudūd* Bills introduced, respectively, in the northern states of Kelantan in 1993 and then in Terengganu in 2002 under the Islamic Party of Malaysia (known as PAS) that ruled those two states.[6] The two bills were duly passed by state legislatures in the two states and received assent from their respective sultans at the time, but both bills have remained in abeyance ever since due mainly to constitutional issues and resistance on the part of the federal government, then under the leadership of Prime Minister Dr. Mahathir Mohamad. Ever since its ratification in 1993 by the State Legislative Assembly of Kelantan, the Hudud Bill of Kelantan,[7] and Islamic criminal law generally, have been the focus of public debate and media coverage in Malaysia. The book's discussion revolves around the six *ḥudūd* offences the two bills have introduced. This is a narrative mainly of the actual problems encountered and how they have been raised, discussed, and debated in public media and the multireligious context of Malaysia. Issues have been raised concerning the actual implementation of the two bills and how they are likely to impact the non-Muslims of Kelantan and Terengganu. Then the discussion presents representative views and responses of non-Muslim spokespersons of Chinese and Indian political parties. The Muslim protagonists of

ḥudūd, especially the PAS, have persistently challenged their Chinese and Indian counterparts and critics on how the *ḥudūd* bills should be seen and understood and, in some cases, how they can be amended and improved. The chapter also examines provisions of the Hudud Bill of Kelantan that stand in conflict with Malaysia's Federal Constitution of 1957 and the Penal Code of 1936 (amended on numerous occasions and last revised on 7 August 1997).

Malaysia has in many ways been singled out as a showcase as it presents an interesting scenario of the applied aspects of Islamic criminal law and its problematics. Malaysia is a multireligious society, a federal state, and a self-acclaimed democracy,[8] where the present author also resides and where a lively *ḥudūd* debate has been ongoing for the last three decades. The Muslims of Malaysia that constitute about 60 percent of its population take Islam, the Malay language, and customs as the three major criteria of their identity. Islam is in many ways a living tradition and way of life of the Malay Muslims and constitutes a major theme and context, such that almost all important socioeconomic and political developments in this country must negotiate and find accommodation with Islam. In Malaysia, Islam as a religion and, increasingly, as an emerging legal system—after the colonial suppression and marginalisation of shariah—can be seen as a case study as to the ways and means by which it has engaged with contemporary issues generally and those of concern to the present study. The case of Malaysia shows how a reasonably successful country—with a market economy, high exposure levels to the outside world, and a credible claim to inclusivity—deals with Islamic and shariah-related issues. Unlike Indonesia, Pakistan, and some other Muslim countries where Islam is the religion of the vast majority of the population, Muslims in Malaysia are challenged by the presence of much larger and economically powerful non-Muslim minorities.

Issues have also arisen over shariah courts' jurisdiction and the extent of their powers to adjudicate *ḥudūd* offences in Malaysia.[9] References have been made to policy statements by both state and federal government representatives on possible amendments to the Hudud Bill of Kelantan 1993 that have featured in the media over the years. This is followed by similar, although less detailed, coverage of the Hudud Bill of Terengganu 2002, which was also tabled before the Terengganu Legislative Assembly by the PAS. The Terengganu Hudud Bill is a near-replica of its Kelantan antecedent, albeit with minor amendments with reference particularly to non-Muslims. The book's presentation of these issues highlights the likely

implications of applying this bill to a dual system of law and justice that obtains in Malaysia.

Even after twenty-four years since the introduction of the Hudud Bill of Kelantan (HBK), it appears that one can hardly claim meaningful progress on the *ḥudūd* issue in Malaysia. Why this is so becomes a compelling question. The HBK has come under criticism on specific points as well as generally and thus indicates an eagerness to inflict punishment and pain. This approach may need to be moderated by other influences that are also important in the formulation of a comprehensive philosophy of punishment.

It seems ironical that Kelantan has gone so far as to celebrate Hudud Day as an annual event, as if to prove its credentials as the one, true authority on the religion among the thirteen states of Malaysia by being the most punitive. It also seems odd somehow to choose punishments as deserving of celebration and calling on people to publicly observe the occasion. It is easy to forget, however, that *ḥudūd* laws are not even implemented in Kelantan—yet the people are still asked to observe Hudud Day!

An update of more recent developments in the *ḥudūd* debate from 2012 to 2017 is presented in a separate section of the chapter. Here one may see the arrival, for the first time, of a different political scenario that tends to be more receptive to approval of HBK by the federal government.

Part three on "*Ḥudūd* in Other Muslim Countries" provides brief comparative reviews of *ḥudūd*-related legislation and developments in a select number of Muslim countries in Asia, Africa, and Southeast Asia. This part consists mainly of bird's-eye views on the legal system in each of the countries under review, including their particular circumstances and concerns. The book's comparative coverage of Islamic criminal law issues in these countries also touches on common features of *ḥudūd* as well as the gap between theory and practice of *ḥudūd* in these countries. In almost every country discussed in the book, issues arise over the religious sensitivity of shariah punishments that negatively affect, in turn, the prospects of advancing open rational discourse about *ḥudūd*. The climate of understanding concerning *ḥudūd* has been increasingly restricted in the post-Islamic revivalist environment of these countries.

Notwithstanding the difficulty of disentangling the politics of *ḥudūd* from jurisprudence, the book's main concern is to advance an understanding of the jurisprudence of *ḥudūd* through a reading of the sources of shariah, especially the Qur'an and Sunnah, in a way that a modern student of law can understand. The discussion also aims to open the space

for advancing fresh interpretations and perspectives on scriptural sources relating to shariah and *ḥudūd* along with fiqh-related developments.

Governments in Muslim societies have generally not encouraged *ijtihād*-oriented discourse over Islamic issues. This epiphenomenon to some extent involves rampant secularism and marginalisation of the role of religion and ulama in the nation-states of Western origins, which have dominated postcolonial polities in much of the Muslim world. The increasingly assertive tone of Islamic revivalist discourse in many multireligious societies has been espoused by similar developments among other religious communities. Muslim governments are consequently faced with fresh demands to accommodate different voices and be more inclusive in their quest to find answers to religious and shariah issues. These concerns are thus no longer treated as if they were exclusively the realm of ulama and jurisconsults; leaders are asked to be more receptive to other voices that may express the needs and aspirations of non-Muslim constituencies.

History has shown that Islam is no stranger to inclusivity and that it has the resources to accommodate different voices—amply demonstrated by the Prophet Muḥammad's own example and precedent on how he dealt with the Arab pagans of Quraysh and Jews and Christians. That early precedent has also in many ways reverberated throughout the longer history of Islam, which was severely disrupted by the colonialist onslaught and the problematic legacies left in its wake.

The argument of this book is thus mainly over the approach that is taken towards understanding shariah and Islamic criminal law. In the history of Qur'an interpretation (*tafsīr*) and hadith, as well as the main body of Islamic juristic thought, the literalist approach has had the upper hand over a rationalist and pragmatic understanding of Islam and shariah. Although the schools of law (*madhhab*s) did to some extent open the scope for rationality and pragmatism in the formulation of fiqh rules, their attempts were on the whole timebound and reflective of the concerns of the respective societies and cultures in which they occurred.

The historical controversy between Rationalists and Traditionists (*ahl al-raʾy* and *ahl al-ḥadīth*, respectively) was essentially over restricting the scope of *ijtihād* to a degree that Imam al-Shāfiʿī (d. 205/820) confined *ijtihād* to analogical reasoning (*qiyās*) alone when he wrote in his renowned *Risālah* that *ijtihād* and *qiyās* were two words that had the same meaning. With reference to Qur'an hermeneutics, it is common knowledge that *tafsīr* based on opinion (*tafsīr bi'l-raʾy*) was given little weight vis-a-vis *tafsīr* on the basis of precedent (*tafsīr bi'l-maʾthūr*). The *uṣūlī* methodological

thought of earlier centuries ignored the broader approach to the understanding of shariah taken by advocates of the *maqāṣid al-Sharīʿah* (goals and purposes of shariah), which laid greater emphasis on the ends and purposes of the law. It was not until the eighth century Hijrah that the Andalusian scholar, Ibrāhīm al-Shāṭibī (d. 790/1388), developed his theory of the *maqāṣid* and opened a new chapter in the history of Islamic jurisprudential thought. Yet it was already too late for al-Shāṭibī to make much of an impact on scholastic jurisprudence and the works of the leading schools of law (*madhāhib*), which had by then developed to an advanced stage. Scholastic studies also showed limited acceptance of the *maqāṣid al-Sharīʿah* theory due to its somewhat philosophical overtones. Twentieth-century Islamic scholarship showed renewed interest in the revival of the *maqāṣid* and original *ijtihād* that may well mean departing from some of the hallowed positions of conventional jurisprudence on a number of issues including *ḥudūd*.

The present generation of Muslims would need to continue the tenor of those endeavours and offer relevant responses to the issues they face in light of their own needs and experiences. Considerations of piety and devotion in the interpretation of Qur'an and hadith were strong enough perhaps to keep jurists and interpreters close to the texts of sacred scripture. Even in the sphere of juristic thought (fiqh and *ijtihād*), attention was focused on formulas and methods that ensured conformity to the text and restrictive forms of analogy—at the expense sometimes of the higher purposes (*maqāṣid*) of shariah such as justice and public welfare (*maṣlaḥah*). The divine words of the Qur'an were in many ways taken as value points in themselves rather than as a vehicle and carrier of values. A great deal of that legacy remains with us to this day and has even found fresh impetus through the radicalisation of Islam in recent decades. This also relates to the challenges involved in Islamic criminal law and *ḥudūd*.

In sum, this book offers a modest contribution towards a better understanding of an evidently difficult subject that continues to generate controversy and misunderstanding about shariah and Islam. The avenues of originality and self-renewal have been exceedingly restricted concerning Islamic criminal law, especially regarding *ḥudūd* punishments. There is clearly a need for better answers and for opening the avenues of discursive enquiry to facilitate an understanding of these issues. This book raises many questions and answers some, but there is scope for further enquiry, and it is hoped that other researchers will continue the quest to address issues and help bridge the gap between shariah and social reality.

PART ONE

Shariah Perspectives

II

Islamic Criminal Justice

AN OVERVIEW

DIFFERENCES HAVE EXISTED among various criminal justice systems throughout history. They have all shared certain basic components, such as normative provisions, procedural rules, evidential requirements, and applicable sanctions. The Islamic criminal justice system contains all of these components and shares a number of similarities with other systems. Yet the Islamic system also has peculiarities that are largely derived from its use of scriptural sources as well as the juristic doctrines that were developed by scholars in tandem with the cultures and customs of their communities.

Islamic criminal law is composed of three main categories of crimes and punishments: *ḥudūd* (prescribed crimes and punishments), *qiṣāṣ* (just retaliation) crimes and punishments, and *taʿzīr* (crimes that call for deterrent but discretionary punishments that fall outside the *ḥudūd* and *qiṣāṣ* categories). Each category has its own substantive norms, evidentiary standards, and procedures. For instance, *ḥudūd* crimes are prescribed in the Qur'an and the Sunnah, whereas *qiṣāṣ* crimes appear in these sources only as statements of principles. *Taʿzīr* offences are found in the Qur'an or Sunnah only by indication, and they are then elaborated through juristic construction, analogy, and custom. In the conventional theory of *ḥudūd* laws, human legislatures do not have the authority to change them by adding to or reducing them, and there is theoretically no room for the application of pardon by rulers and judges. *Qiṣāṣ* crimes consist of aggression on life and limb through homicide and bodily injuries. These crimes are also based on scripture, yet they are amenable to adjustment and pardoning by relevant parties and authorities. *Taʿzīr* crimes and punishments

encompass all offence types and transgressions—sometimes even within the rubrics of *ḥudūd* and *qiṣāṣ* (e.g., when a *ḥudūd* crime does not fulfil all or some of its stipulated conditions, it may fall under *taʿzīr*). Yet they are not quantified and remain open to judicial discretion by rulers and judges.[1]

Crimes and punishments in the traditional fiqh sources are established through shariah evidence and are not based on personal choices of jurists and judges. A punishment is shariah-compliant when it is based on valid sources and issued by lawful authorities. The sources are the Qur'an, the Sunnah, and general consensus (*ijmāʿ*), as well as statutory law (*qānūn*)—the last two of which are duly validated by learned scholars and those in charge of community affairs (i.e., the *ūli al-amr*). The latter must also not contravene the textual injunctions of Qur'an and Sunnah. Analogy (*qiyās*), although a recognised proof in shariah, is generally not relied upon in crimes and punishments due to elements of doubt that inhere in *qiyās*, although this is also subject to juristic disagreement. The legality (*mashrūʿiyyah*) of punishment also means that "the judge does not order a punishment based on his own thinking, even if he thinks it to be the most suitable and shariah-compliant punishment."[2] For this would amount to an "arbitrary exercise of power" (*sulṭah taḥakkumiyyah*) in the imposition of punishment, which has no basis in shariah.

The first two of the three categories of punishment, namely of *ḥudūd* and just retaliation (*qiṣāṣ*), are regulated and quantified by the text, leaving little scope for the judge to alter, substitute, or omit. Whenever a crime is duly proven, the judge applies the specified punishment for it. Should there be no specified punishment for a crime in the text or the general consensus, it would likely fall under *taʿzīr*. But even here, although the judge has wider discretionary powers, "this is not arbitrary power—*taḥakkumiyyah*,"[3] as the scriptural sources of shariah and consensus provide the basis of the wrongful conduct in question. In the meantime, the judge is authorised to specify a suitable punishment in light of the principles and guidelines found in the fiqh expositions of the offences.

Another aspect of the legality of punishments in shariah is that they are determined by reference to objective principles that apply to all people equally, regardless of their personal attributes and social standing, such that everyone—from the head of state to the man in the street, rich and poor, learned or otherwise—stand equal before the law and court of justice without discrimination and privilege of any kind. This degree of objectivity is a prerequisite especially of *ḥudūd* and *qiṣāṣ*, but in *taʿzīr* the judge pays

some attention to the personal attributes of the offender and his social standing in the determination of a suitable punishment. That still does not derogate from the shariah principle of equivalence between the crime and its punishment in that no one must suffer punishment in excess to the pain the offender has inflicted on another and the wrongful conduct he or she may have committed. Some exceptions to this principle may exist on grounds of religion (e.g., non-Muslims are not liable to punishment for drinking or apostasy).

All punishments are personal in the sense that no one else but the offender is to be punished for wrongdoing, and no one else must be made to suffer due to the conduct of another person. This too is one of the fundamental premises of the legality of punishments in shariah. It was due to the commitment to this principle that Islam overruled the tribalist practices of pre-Islamic Arabia, especially those customs that were deemed oppressive and failed to qualify under the Islamic standards of objectivity. Equality before the law and before the court of justice, a substantive line of equivalence between the crime and its punishment, and the principle of nonretroactivity in crimes and penalties underline the Islamic law of crimes and punishments. These were among the reform measures that marked a departure from the tribalist system of justice in pre-Islamic Arabia.[4]

One may add to this analysis an emerging trend that views *ḥudūd* laws from a different angle, namely the unprecedented increase of terrorism and violence, suicide bombing, drone attacks, and state terrorism. In conflict-ridden communities and postconflict justice scenarios, suspicious situations are sometimes encountered wherein warlords and criminals themselves take high positions and become influential in government. Even the state is sometimes seen as complicit to crime—hence a fresh demand is made for the restoration of *ḥudūd* laws that are known to be more resolute and less dependent on the vicissitudes of politics and the divergent demands of questionable interest groups.

Furthermore, the era of constitutionalism and its articulations—more specifically, the principle of legality in crimes and punishments—have brought about the reality and demand that Islamic criminal law must be codified and articulated in a definitive text that is approved by elected bodies and parliaments. This is because historically and even now Islamic law and jurisprudence is contained in the fiqh juristic manuals authored by private jurists, not by state institutions or functionaries. Although the statutory law codes in Muslim countries provide a comprehensive articulation of the substantive and procedural aspects of crimes and penalties

and are largely taken from shariah manuals, they are not a total replica of those juristic manuals. Twentieth-century codification of laws in the Muslim world has also espoused extraneous elements and served as a medium, to some extent, of transformation. This has been prompted, in turn, by the ubiquitous drive toward secularity and Westernisation of laws, especially under colonial rule. But since then, many Muslim countries and law-making bodies of the postcolonial era have sought to take mixed and intermediate approaches in retaining some Western ideas and principles and combining them, as and when deemed appropriate, with substantive shariah law doctrines. This and the historical background developments just reviewed have been more noticeable in the spheres of public law, including commercial law, criminal law and procedure, and constitutional law, but not as much in the private and personal law aspects of shariah.

III

Ḥudūd *in the Qur'an, Sunnah, and Fiqh*

THIS PART EXPLORES the hypothesis that the juristic concept of *ḥadd* and *ḥudūd* in the fiqh expositions differ from what they mean in the Qur'an. Some contend that the rigidities attendant in the juristic doctrines are not Qur'anic. The discussion begins with a brief review of the concept and meaning of *ḥadd* and *ḥudūd* and then examines the manner of their exposition in the Qur'an and Sunnah. The fiqh formulations of *ḥudūd* will be looked at in a separate section that follows.

Ḥudūd *in the Qur'an*

The literal and technical meanings of *ḥudūd* (the plural form of *ḥadd*) are closely interrelated and often interchangeable. In Arabic, *ḥadd* literally means a boundary or limit that separates and prevents one thing from intruding another. The door keeper (*bawwāb*) and prison guard (*sajjān*) in Arabic are also referred to as *ḥaddād* as they both prevent the public from entering into the place that they try to keep separate and protect from outside intrusion. Technically, *ḥudūd* refer to fixed punishments as divinely ordained limits and punishments God Most High has specified for certain varieties of conduct. They are understood as God's Rights that seek to prevent transgression of His limits and also signify the limits of what is tolerable in shariah and what is not. *Ḥudūd* as such preclude the deterrent punishment of *taʿzīr* as this is not specified, just as they also preclude just retaliation (*qiṣāṣ*) in the sense that *qiṣāṣ*, according to fiqh jurists, consists largely of private rights or the Rights of Man in contradistinction with *ḥudūd*, which all fall under the Right of God. The juristic

usage of *ḥadd* also carries two other related meanings, one of which refers to the crime itself, such as by saying that so and so committed a *ḥadd*, by which is meant the offence itself rather than the punishment it carries. This would be roughly equivalent to the Arabic word *jināyah* except that the latter is more general and includes all kinds of crimes. And then *ḥadd* is also used to refer to the punishment, as in the expression "the *ḥadd* was applied to so and so," meaning that the prescribed punishment was applied to him. This usage would be a rough equivalent of the Arabic word *ʿuqūbah*, which is also a general term for all types of punishments, whereas *ḥudūd* refer to a certain category of specified or quantified punishments.[1]

Ḥudūd Allāh (lit., God's limits) is a familiar Qur'anic expression that occurs fourteen times in the Holy Book in the typical sense of signifying the "limits," whether moral or legal, of acceptable behaviour from that which is unacceptable—for example, in the sense of separating the halal and *ḥarām* (lawful and unlawful) from one another. On no occasion has the Qur'an, however, used *ḥadd* or *ḥudūd* in the sense specifically of punishment, fixed or otherwise. The fact that *ḥadd* and *ḥudūd* later began to signify punishments is derived from juristic terminology and expression, although it may arguably have some origins in the Sunnah. Punishment also signifies a limit and as such can be subsumed within the meaning of *ḥadd* and *ḥudūd*. The idea of "limit" is thus basic both to the literal and the Qur'anic usage of *ḥadd*, which is in one way or another reflected in all of the other usages of this term.

When the Qur'anic usage of *ḥadd* (in the sense of limit) is compared with its usage in fiqh manuals, one notices that a basic development has taken place, which is that *ḥadd* has been used to signify a fixed and unchangeable punishment that has been laid down in the Qur'an or Sunnah. The concept of *ḥadd* in the Qur'an in the sense generally of a "separating or preventing limit was thereby replaced by the very specific idea of a fixed and mandatory punishment.[2]

Ḥadd, according to its fiqh definition, is "a quantitatively fixed punishment which is imposed for violation of the Right of God." This juristic characterisation of *ḥadd* as the Right of God signifies that it is meant to be a mandatory punishment, a demand from God that requires fulfillment, and that no one, including the victim, judge, or head of state, has the authority to pardon, change, or suspend it.[3]

The basic philosophy of *ḥudūd*, as one of the three classes of punishments in Islamic criminal law, is to inflict pain on the perpetrator as an

expression of the society's rejection of his conduct, to deter the perpetrator and others from such acts, and to protect the essential interests (*al-maṣāliḥ al-ḍarūriyyah*) of the people. Deterrence is the overriding objective of *ḥudūd*, so much so that the renowned Shāfiʿī jurist and judge al-Māwardī (d. 450/1058) makes a point of it in his definition of *ḥudūd* as "deterrent punishments which God Most High has enacted in order to prevent man from committing what He forbade and from neglecting what He commanded."[4] There is a certain degree of objectivity in the fiqh concept of *ḥudud* as mandatory punishments in that they must be enforced, in exact quantity and specification, on everyone regardless of the place or circumstance in which they are committed. Factors such as the personality, status, even previous record of the offender, or of the victim, are of little consequence in the enforcement of *ḥudūd*. This position is different in *taʿzīr* (lit., deterrence, i.e., a deterrent but unprescribed sanction or punishment) and *qiṣāṣ* (retaliation), both of which take into account the personality of the offender and also the victim's right and desire to retaliate. The victim in the case of *qiṣāṣ*, and the judge or the head of state in the case of *taʿzīr*, are entitled, under certain conditions, to pardon the offender, to effect a compromise solution, or to choose a punishment that might seem suitable under the circumstances. There is also room in theory for juristic construction or *ijtihād* by the judge and the head of state in both *taʿzīr* and *qiṣāṣ*, but not in *ḥudūd*. The prescribed punishment, for example, of eighty lashes for slanderous accusation (*qadhf*) may not be increased or decreased regardless of such factors as the social status and public image of the victim or the motive, personality, and character of the offender.[5]

Of the fourteen instances where *ḥudūd* is referred to in the Qur'an, no less than six occur in just one passage on the subject of divorce, which is as follows:

> Divorce [may be given] twice. Thereafter either retain [the wife] according to good custom, or a decent manner [*bi'l-maʿrūf*] or let [her] go with kindness. And it is impermissible for you to take back anything you have given her unless the couple fear that they may transgress God's limits [*ḥudūd Allāh*]. If there is fear that they may transgress *ḥudūd Allāh*, they commit no sin if the wife willingly gives anything back [of the dower she may have received]. These are the *ḥudūd Allāh*, do not transgress them. Those who transgress *ḥudūd Allāh*, they are unjust. But if he [the husband] divorces her,

she will not be lawful to him thereafter until she marries another man. If he [the second husband] divorces her, there is no harm if the two return to each other, if they think they can observe the *ḥudūd Allāh*. And these are the *ḥudūd Allāh*, which He makes clear for a people who know. (al-Baqarah, 2:229–230)

الطَّلَاقُ مَرَّتَانِ ۖ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ ۗ وَلَا يَحِلُّ لَكُمْ أَن تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَن يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ ۖ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ ۗ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا ۚ وَمَن يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ ۝ فَإِن طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِن بَعْدُ حَتَّىٰ تَنكِحَ زَوْجًا غَيْرَهُ ۗ فَإِن طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا أَن يَتَرَاجَعَا إِن ظَنَّا أَن يُقِيمَا حُدُودَ اللَّهِ ۗ وَتِلْكَ حُدُودُ اللَّهِ يُبَيِّنُهَا لِقَوْمٍ يَعْلَمُونَ

Ḥudūd Allāh carries slightly different meanings in its various applications even in this passage. While the idea of limits is common to all six incidents above, in its uses of 2, 3, and 6 it refers to the specific injunctions contained in the body of the text. Uses of 1, 4, and 5 do not refer to anything specifically stated, let alone enjoined, either here or indeed elsewhere in the Qur'an. In other words, when the Qur'an speaks of observing *ḥudūd Allāh* it states neither here nor elsewhere specifically what these "limits" actually are.

With reference to marital relations, the Qur'an demands that the spouses treat one another decently and in accord with the approved custom of society (*bi'l-maʿrūf*). This is not to say that there are no other injunctions concerning marital relations in the Qur'an, but for the purposes of this text, *ḥudūd Allāh* is a general reference to the total conduct of marital life that is conveyed by *bi'l-maʿrūf*. The content of good or approved custom in this context is thus integrated into the general meaning of *ḥudūd Allāh*.

There are two more points of note in this passage. Firstly, *ḥudūd Allāh* has no reference to punishment but is concerned mainly with a moral situation that may or may not have legal or punitive implications. Secondly, the content of "good or approved custom" is evidently liable to change and is not in tune with the idea of a fixed and invariable position. This must also imply that the content of *ḥudūd Allāh* is variable to that extent and also that it is conceptually amenable to comprising changeable conditions or provisions.[6]

The basic concern of *ḥudūd Allāh* in the Qur'an is clearly with the moral limits of conduct in the sense of identifying what is generally good and righteous. This can be even more vividly seen in the following verse, which promises great reward:

> Those who repent, worship and praise God, those who fast and bow down and prostrate, and those who enjoin good and forbid evil and preserve the limits of God [*ḥudūd Allāh*] and give good news to the believers. (al-Tawbah, 9:112)

التَّائِبُونَ الْعَابِدُونَ الْحَامِدُونَ السَّائِحُونَ الرَّاكِعُونَ السَّاجِدُونَ الْآمِرُونَ بِالْمَعْرُوفِ وَالنَّاهُونَ عَنِ الْمُنكَرِ وَالْحَافِظُونَ لِحُدُودِ اللَّهِ ۗ وَبَشِّرِ الْمُؤْمِنِينَ ۚ

In a preceding passage of the same sura, the Qur'an censures the perfidy of certain Bedouin tribes who had violated their defence pact with the Muslims:

> The Bedouins are most intense in disbelief and hypocrisy and most disposed not to know the limits that God has revealed [*ḥudūda mā anzal Allāh*] to His Messenger. And God is Most Knowing, Wise. (al-Tawbah, 9:97)

الْأَعْرَابُ أَشَدُّ كُفْرًا وَنِفَاقًا وَأَجْدَرُ أَلَّا يَعْلَمُوا حُدُودَ مَا أَنزَلَ اللَّهُ عَلَىٰ رَسُولِهِ ۗ وَاللَّهُ عَلِيمٌ حَكِيمٌ

Although "the limits that God has revealed to His Messenger" must still have a general meaning as a reference to the totality of Qur'anic teachings, the verse here nevertheless alludes, according to reports, to the Bedouin tribes' nonparticipation in jihad, despite the definite agreements that were made to that effect—which are however nowhere stated in the Qur'an but only indirectly indicated in the succeeding portion of the text.

In two other places (al-Baqarah, 2:187 and al-Ṭalāq, 65:1) *ḥudūd Allāh* is concerned with marital relations: the first with conjugal relations during the fasting month of Ramadan, and the second with the waiting period (i.e., *ʿiddah*) that the wife must observe following a divorce. The text in both places warns against violating *ḥudūd Allāh*. But an interesting example of this expression occurs in the following passage where the text recommends kindness to orphans and the needy and specifies fixed shares in inheritance for legal heirs, and then declares:

> These are the limits of God [*ḥudūd Allāh*]; whosoever obeys God and His Messenger, He will grant him entry into Paradise underneath which rivers flow—and this is a great success. But whosoever disobeys God and His Messenger and violates His limits [*ḥudūdahu*],

> He will make him enter fire wherein he shall reside, and this is for him a humiliating torment. (al-Nisāʾ, 4:13–14)
>
> تِلْكَ حُدُودُ اللَّهِ ۚ وَمَن يُطِعِ اللَّهَ وَرَسُولَهُ يُدْخِلْهُ جَنَّاتٍ تَجْرِي مِن تَحْتِهَا الْأَنْهَارُ خَالِدِينَ فِيهَا ۚ وَذَٰلِكَ الْفَوْزُ الْعَظِيمُ ۞ وَمَن يَعْصِ اللَّهَ وَرَسُولَهُ وَيَتَعَدَّ حُدُودَهُ يُدْخِلْهُ نَارًا خَالِدًا فِيهَا وَلَهُ عَذَابٌ مُهِينٌ ۝

Notwithstanding the fact that the text in the three verses referred to contains specific injunctions of a legal nature, yet the consequences of conformity and disobedience to them are postponed to the Hereafter. This might indicate "how little concerned the Qur'an is with the purely legal side and how much more with the setting of the moral tone of the community."[7] The Qur'an shows little inclination to enforce its instruction through the modality of fixed punishment.

Ḥudūd Allāh also occurs in the Qur'an in reference to atonement or self-imposed punishment (i.e., *kaffārah*) in conjunction with *ẓihār*. This is a form of divorce, originally a pre-Islamic practice, where the husband declares his wife to be unlawful to him "like the back of his mother." The atonement or *kaffārah* that the husband needs to observe in the event of resuming marital relations here consists of one of the following three: to release a slave, to fast for sixty consecutive days, or to feed sixty poor persons. The text then proceeds to declare that "these are God's limits [*ḥudūd Allāh*] and [appointed] for disbelievers is painful torture" (al-Mujādalah, 58:3–5). It is of interest to note here the use of *ḥudūd Allāh* in reference to a specific but self-imposed punishment that does not involve either the court or other enforcement authorities but only the individual himself. Moreover, by suggesting three alternative atonements for *ẓihār*, the Qur'an seems to admit the idea of alternative/variable punishment for *ḥudūd Allāh* in line with the ability and condition of the persons who observe the *kaffārah* in question.

Our analysis here is confirmed by Maududi's characterisation of *ḥudūd Allāh*, or "Divine Limits," as he phrases it, a broad Qur'anic concept that reaches far beyond the limitations of fixed or invariable punishments:

> Limitations on human freedom, provided they are appropriate...are absolutely necessary....That is why God has laid down those limits, which in Islamic phraseology are termed "Divine Limits" [*ḥudūd Allāh*]. These limits consist of certain principles, checks and balances, and specific injunctions in different spheres of life and activity—and they have been prescribed in order that man may be trained to lead a

> balanced and moderate life. They are intended to lay down the basic framework within which man is free to legislate, decide his own affairs and frame subsidiary laws and regulations for his conduct.[8]

It is thus evident that the Qur'anic concepts of *ḥudūd* and *ḥudūd Allāh* are not necessarily meant to consist of punishments nor of purely mandatory ones. They are used in the Qur'an to imply a set of broad moral and legal guidelines that must be observed and upheld. But nowhere has the text specified the manner in which they should be observed other than the emphasis, perhaps, that compassion should not impede one's determination in combatting crime. This must surely be observed, but in the meantime it should be merged and reconciled with the Qur'anic directives on repentance and reform, and it is to this that we now turn.

Repentance (Tawbah) *and Reform* (Iṣlāḥ) *in the Qur'an*

In all the four instances where the Qur'an specifies a punishment for an offence, there is also a provision on repentance, forgiveness, and reform. This is a consistent feature of the penal philosophy of the Qur'an, which has, however, not been adequately reflected in the juristic blueprint of *ḥudūd* nor indeed in *ḥudūd*-related enactments, laws, and acts of parliament that various Muslim countries, including Malaysia, have introduced in recent decades. Notwithstanding the dual emphasis that the Qur'an lays on punishment and repentance, juristic doctrine pays undivided attention to punishment to such a degree as to maintain persistently that once the offender has been convicted of a *ḥudūd* offence, repentance has no value and no one has the authority to pardon him. But then one reads a different message in the Qur'an. Let us begin by looking at the passage on the punishment of theft:

> As to the thief, male or female, cut off their hands as retribution for their deeds and exemplary punishment from God. And God is exalted in power, Most Wise. But if he repents after his crime and amends his conduct, God redeems him. God is Forgiving, Most Merciful. (al-Mā'idah, 5:38–39)

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالاً مِّنَ اللَّهِ ۗ وَاللَّهُ عَزِيزٌ حَكِيمٌ
فَمَن تَابَ مِن بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ ۗ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

While the first part of this verse prescribes the crime and its punishment, the second part balances that approach immediately by opening the door to repentance, self-emendation, and reform. The Qur'an here establishes a certain perspective, which is that punishment should not be hastily carried out because repentance and correction naturally come as a result of enlightenment, advice, and education. The reference to repentance in the text is followed by *aṣlaḥa* (rectifies or reforms himself), and the two together would seem to require that the convict should not only be given time in which repentance and reformation can occur but also that this should be facilitated, on a selective basis at least, by positive incentives. The Qur'anic perspective here is hardly compatible with the rigid approach that has characterised *ḥudūd* in the established juristic doctrine of the leading schools of Islamic law.

Commenting on this verse, the renowned Egyptian scholar Abū Zahrah (d. 1974) wrote, with regard to the Qur'anic words '*al-sāriq wa'l-sāriqah*' (thief—male or female), that these are adjectives, not verbs, and adjectives do not materialise in a person without a measure of repetition. A person is not, for example, described as "generous," "honest," or "liar" merely by a single act of generosity, honesty, or lying that does not show consistency or establish a pattern. These adjectives carry their full meanings when there is recurrence and repetition. The verse did not begin by saying, for instance, that theft is punishable with such and such a punishment; it refers instead to '*sāriq*' and '*sāriqah*'. When we read the verse from this perspective, then the punishment that it conveys should apply to repeat offenders and recidivists, and if it is applied to first-time offenders it should only be in aggravating circumstances. This analysis also finds support in the Sunnah of the Prophet and also precedent of the caliph ʿUmar b. al-Khaṭṭāb. In the reports concerning the well-known case of al-Makhzumiyyah, a woman whose hand was mutilated for theft, it is noted that she was a recidivist and known for the fact that she did not return goods that were deposited with her or things that she borrowed from others. Many Ḥanbalī scholars have gone on record to say that this was, in fact, the nature of her offence; but the majority maintains that it was a specific case of theft. Be that as it may, what is certain is that she was known for having committed similar offences, which is why she had acquired a reputation for it. When the Prophet determined al-Makhzumiyyah's predicament, this was notwithstanding the fact that she was an important figure among the Quraysh tribe, hence the leaders of Quraysh interceded on her behalf and asked the Prophet if she could be pardoned—and it was on this occasion when the Prophet uttered his renowned statement that "if Fāṭimah, Muḥammad's

daughter, committed theft, Muḥammad would cut her hand." According to another report, when the caliph ʿUmar b. al-Khaṭṭāb decided to mutilate the hand of a young offender, his mother said: "Pardon him O Commander of the Faithful, because it was his first time." To this the caliph responded, "God is too merciful to reveal the nakedness of His servant for his first failure." The culprit was not punished.

Abū Zahrah has also discussed, in this connection, the issue of repentance and observed that the wording of the text before us is such that repentance can only find a logical place in it if there is an opportunity before the imposition of punishment. This, he adds, is not the view of the majority of jurists but a view that is sustainable by the text itself. Some jurists have in fact arrived at this conclusion. It is then added that the Qur'an opens the door to repentance, as the verse that will be quoted next indicates, not to recidivists and confirmed criminals, who are not likely to be sincere repenters anyway, but to first-time offenders who may well be ready to repent: "Repentance with God is only for those who do evil in ignorance, then turn [to God] soon. It is to these that God turns with mercy. God is indeed all-knowing and most wise" (al-Nisāʾ, 4:17).

إِنَّمَا التَّوْبَةُ عَلَى اللَّهِ لِلَّذِينَ يَعْمَلُونَ السُّوءَ بِجَهَالَةٍ ثُمَّ يَتُوبُونَ مِن قَرِيبٍ فَأُولَٰئِكَ يَتُوبُ اللَّهُ عَلَيْهِمْ ۗ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا.

A Qur'an commentator, al-Ṭabarī (d. 310/923), records the view that "ignorance" in this verse applies to anyone who indulges in sinful conduct until he withdraws from it and returns to the right path.[9] According to al-Māwardī, "ignorance" in this context has two meanings, one of which is ignorance of the evil nature of conduct and the other when one succumbs to one's desire and does something knowing that what one does is wrong. While quoting both these meanings, Fatḥī al-Khammāsī considers the latter the more likely of the two.[10] In yet another view attributed to al-Zuzanī, it is noted that when "it is said that so and so is ignorant" it often refers to a youth who does not think of the consequences of his conduct and gives way to his whims and desires.[11] Understanding the implications of "ignorance" in the verse is thus likely to widen the scope of its application in the context of repentance: the first-time offender and a remorseful youth; or one with no criminal record, who may have fallen into sin, committed adultery or theft, and then repented. Then he or she should be entitled to relief.

The broader perspective of the Qur'an on repentance and the general encouragement towards it can hardly be overestimated when it is openly

stated elsewhere that "God loves those who turn to Him in repentance and He loves those who purify themselves" (al-Baqarah, 2:222).

إنَّ اللَّهَ يُحِبُّ التَّوَّابِينَ وَيُحِبُّ الْمُتَطَهِّرِين.

The conclusion is thus drawn not only that repentance purifies one from guilt but also that mutilation of the hand for the capital crime of theft is not for the first-time offender who acts out of ignorance but for confirmed criminals with a criminal record. This would also tally well with our understanding and analysis that the idea of limit or *ḥadd* should signify the uppermost limit, or the end of the road, so to speak, and not be applied to an inconclusive situation.[12]

Another Qur'anic verse that needs to be looked at, however briefly, is the one on the punishments both of adultery (*zinā*) and slander (*qadhf*), which occur in a sequence that relate the one to the other.

> The woman and the man guilty *of zinā,* flog each of them a hundred lashes. Let not compassion move you in their case from carrying out God's law (*dīn Allāh*) if you believe in God and the Last Day. And let their punishment be witnessed by a group of the believers....And those who accuse chaste women and produce not four witnesses, flog them eighty lashes and reject their testimony ever after. For they are transgressors. Except for those who repent thereafter and reform themselves, then God is Forgiving, Most Merciful. (al-Nūr, 24:2–5)

الزَّانِيَةُ وَالزَّانِي فَاجلِدوا كُلَّ واحِدٍ مِنهُما مِائَةَ جَلدَةٍ ۖ وَلا تَأخُذكُم بِهِما رَأفَةٌ في دينِ اللَّهِ إن كُنتُم تُؤمِنونَ بِاللَّهِ وَاليَومِ الآخِرِ ۖ وَليَشهَد عَذابَهُما طائِفَةٌ مِنَ المُؤمِنينَ ... وَالَّذينَ يَرمونَ المُحصَناتِ ثُمَّ لَم يَأتوا بِأَربَعَةِ شُهَداءَ فَاجلِدوهُم ثَمانينَ جَلدَةً وَلا تَقبَلوا لَهُم شَهادَةً أَبَدًا ۚ وَأُولٰئِكَ هُمُ الفاسِقونَ. إِلَّا الَّذينَ تابوا مِن بَعدِ ذٰلِكَ وَأَصلَحوا فَإِنَّ اللَّهَ غَفورٌ رَحيمٌ.

Some commentators have raised questions about the precise implications of the pronoun *illā'l-ladhīna* ("except for those") whether the reference is to slanderous accusers or to transgressors (*fāsiqūn*) in general, and whether the adulterer can also be included among those who may be allowed to repent. Be that as it may, based on the principle that criminal legislation should be interpreted in favour of the accused and on the side of leniency, it is submitted that all of the preceding categories of offenders are included in the meaning of the last passage and should all be given the opportunity, on a selective basis at least, to repent and to reform themselves.

For otherwise the repeated Qur'anic emphasis on this theme would have been relegated to the realm of moral teaching. The juristic doctrine of *ḥudūd* is, on the other hand, formulated such that leaves little room for a blended approach that might reconcile the notion of certainty and decisiveness in the enforcement of punishment with the prospects of repentance and reform. It is submitted that court procedures and adjudication of *ḥudūd* should be suitably amended and changed so as to reflect the Qur'an's repeated directives on repentance.

We have already discussed the verses concerning three of the four instances where a specific punishment is provided. The only other instance where a punishment is specified is concerned with highway robbery and terrorism (*ḥirābah*). *Ḥirābah* is a separate topic that will be discussed in some detail in the following sections. It may briefly be mentioned here that the text (al-Mā'idah, 5:33) on *ḥirābah* provides for a fourfold punishment of execution, with or without crucifixion and cutting of limbs, depending on whether the robber/terrorist has killed, terrorised, and robbed or only committed one of these crimes without the others. Having spelled out these eventualities, the text then provides, "Except for those who repent before they fall into your power. In that case know that God is Forgiving, Most Merciful" (al-Mā'idah, 5:34).

إِلَّا الَّذِينَ تَابُوا مِن قَبْلِ أَن تَقْدِرُوا عَلَيْهِمْ ۖ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَّحِيمٌ

It is thus evident that the Qur'an leaves the door of repentance and reform open in all of the *ḥudūd* offences without any exception, although in the case of *ḥirābah*, it is contingent on the criminal's surrender to the authorities.

The subject of repentance is almost totally absent in the general run of *ḥudūd* debate in Malaysia or in any other Muslim jurisdiction. One commentator who was a committee member that drafted the Hudud Bill of Kelantan, and who was also state executive councillor of Terengganu in Malaysia, Wan Abdul Muttalib, referred to repentance when he said in an interview: "In Islam, God says it is better for you, if you commit an offence against God, that you don't surrender yourself to be punished, but pray for forgiveness."[13] But with a prayer for forgiveness, it was added, "One must be sure to turn over a new leaf. You can't pray for forgiveness for robbing a person and when you see someone else in the afternoon, you rob him too." Further added was the point that redemption is important in Islam. You don't seek redemption in jest nor for a joke, but so

as to purify yourself. It is not easy as one would always need to take a firm resolve to surrender oneself. This is like the woman (probably meaning al-Ghamidiyyah) who came to the Prophet to confess that she had committed adultery/*zinā*. The Prophet turned to her askance: "Are you mad? Go back." But the woman came back saying, "I have done this—the proof is in my womb." Once again she was asked to go back in case she had made a mistake. The woman came back after she had delivered and said, "This is the illicit child I have given birth to." Then she was told, "Go back and nurse him until he can eat on his own. The child is not a criminal." The sentence was then carried out two years later after the baby had been weaned.[14] The question one may pertinently ask: Has the spirit of this exchange, and other incidents like this on record, been integrated into the juristic doctrine of *ḥudūd*?

Juristic Views on Repentance

Scholars of the leading schools of Islamic law, including the Shia Imamiyyah, are in agreement that in banditry and apostasy repentance prior to arrest absolves the offender from punishment insofar as it relates to the Right of God content of that offence, but not if there is a violation of the Right of Man or private right. The bandit who repents prior to arrest is consequently exempted from the prescribed punishment, but he must return the private property he might have taken. If he is guilty of armed robbery, killing, and terrorising and then repents prior to arrest, the punishment for killing, insofar as the Right of God content of the crime of killing is concerned, is suspended, but he must return the property. Even if the bandit repents and the *ḥadd* punishment is suspended because of it, he will still be liable to retaliation (*qiṣāṣ*), and this latter punishment can only be suspended if the legal heirs of the deceased grant a pardon and make such a request. This is partly because repentance prior to subjugation is presumed to be indicative of sincerity on the part of the offender and it therefore merits consideration and encouragement. But repentance after subjugation, or arrest, is regarded to be out of fear of the expected punishment, which is why it is not admissible.[15]

The majority of jurists have taken the position with regard to all the rest of the *ḥudūd* offences (except for *ḥirābah*) that repentance does not suspend the punishment after the offence has been reported to the authorities. Yet according to a minority view (*muqābil al-aẓhar*—contrary to

the manifest position) of the Ḥanafī and Shāfiʿī schools, and "an opinion also of the Ḥanbalī school," repentance suspends the *ḥudūd* punishments generally.[16] The mainstream position of the Mālikī and Shāfiʿī schools, and also an alternative view of that of the Ḥanbalī school, maintain that *ḥudūd* penalties are not suspended by repentance, even if it occurs before the matter is reported to the authorities. For otherwise, it is asserted, repentance will come in the way of due enforcement of *ḥudūd*.[17] These views are further explained in the following discussion.

As for the effect of repentance with regard to the rest of the *ḥudūd* crimes, Muslim jurists have held three different views, which may be summarised as follows:

1. The first view maintains that repentance suspends the prescribed punishments, if it is offered, as already noted, prior to the completion of the crime and that the crime in question belongs to the Right of God category of *ḥudūd*. The jurists of the Shāfiʿī and Ḥanbalī schools who subscribe to this view have done so by way of analogy to banditry (*ḥirābah*). It is thus argued that *ḥirābah* is the most serious of all crimes, and if repentance in this is admissible, as is stipulated in the clear text of the Qur'an, then the argument for its admissibility is even stronger in lesser crimes, namely of *zinā,* drinking/*shurb*, and theft. Imam al-Shāfiʿī has added that when the adulterer repents, his repentance resembles retraction of a confession, which suspends the *ḥudūd* punishment. Punishment is also suspended if he runs away at the time of the execution thereof. This being the case, a sincere repentance by the offender provides a stronger basis by which to suspend the *ḥudūd* punishment—even after arrest and prosecution and any time prior to enforcement. Al-Shāfiʿī also wrote that "one who repents prior to arrest and prosecution, the *ḥudūd* punishment, but not any private right claim, concerning him is suspended; it is probable that all Rights of God are suspendable by virtue of repentance."[18] The proponents of this view have further stated, with reference to *zinā,* that the initial ruling of the Qur'an on the punishment of *zinā* contained an equally explicit provision on repentance. The relevant text thus provides:

> If any of your women are guilty of lewdness, take the evidence of four witnesses from amongst you against them, and if they testify, confine them to their houses until death claims them or God ordains

> for them some (other) way. If the two of them are guilty of lewdness, punish them both. If they repent and amend, leave them alone; for God is Oft-Returning, Most Merciful. (al-Nisāʾ, 4:15–16)

وَٱلَّتِى يَأْتِينَ ٱلْفَٰحِشَةَ مِن نِّسَآئِكُمْ فَٱسْتَشْهِدُوا۟ عَلَيْهِنَّ أَرْبَعَةً مِّنكُمْ ۖ فَإِن شَهِدُوا۟ فَأَمْسِكُوهُنَّ فِى ٱلْبُيُوتِ حَتَّىٰ يَتَوَفَّىٰهُنَّ ٱلْمَوْتُ أَوْ يَجْعَلَ ٱللَّهُ لَهُنَّ سَبِيلًا. وَٱلَّذَانِ يَأْتِيَٰنِهَا مِنكُمْ فَـَٔاذُوهُمَا ۖ فَإِن تَابَا وَأَصْلَحَا فَأَعْرِضُوا۟ عَنْهُمَا ۗ إِنَّ ٱللَّهَ كَانَ تَوَّابًا رَّحِيمًا.

Unlike the rather obscure view of some jurists that this verse has been abrogated, Abū Zahrah and al-Khammāsī, and before them Ibn Taymiyyah, have refuted the claim of abrogation saying that the text before us is perspicuous (*muḥkam*) and, as such, it is not amenable to abrogation in the first place. It is then stated that the wording of this verse makes the suspension of punishment obligatory upon repentance, for the text here contains a command to "leave them alone—*faʿriḍu*" once they have sincerely repented. There is no conflict, and therefore no abrogation, between this verse and the one that specifies the punishment at 100 lashes for the same offence. The command concerning repentance in this verse is therefore still operative.[19]

The proponents of repentance have also referred to the Qur'anic text on the punishment of theft, which clearly leaves the door open to it:

> But he who repents after his crime and amends his conduct, God turns to him in forgiveness; for God is Oft-Forgiving, Most Merciful. (al-Māʾidah, 5:39)

فَمَن تَابَ مِن بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ ۗ إِنَّ اللَّهَ غَفُورٌ رَّحِيمٌ.

The fact that the provision on repentance here immediately follows the reference to punishment indicates that an exception has been made to the general application of the punishment of theft by way of specification (*takhṣīṣ*) in favour of those who repent.[20] The Prophet has, moreover, said in a hadith: "One who repents from a sin is like one who has committed no sin [التائب من الذنب كمن لاذنب له]". It follows therefore that one who is not guilty of a sin is not liable to its punishment either. The Prophet is also on record to have said concerning the renowned case of Māʿiz b. Mālik, when he was informed that Māʿiz ran away (while being stoned for *zinā*): "Did you not leave him alone to repent so that God would have granted him pardon." The *ḥadd* offence in this case consisted of violation of the Right of God proper, like that of banditry/terrorism, and repentance in both cases leads

to the suspension of punishment.[21] Among the proponents of this view some have further elaborated that repentance, in order to be admissible and convincing, should be accompanied by correction in conduct and this would require time (some suggest a period of six months whereas others only say a long time) in which the sincerity of repentance can be ascertained. There are still others who have not stipulated a probation period of this kind and have merely spoken of repentance itself. Imam Abū Ḥanīfah and his disciples have held that expiry of a long period of time prior to adjudication is by itself enough to suspend the *ḥudūd* punishments, even without repentance, as it would introduce an element of doubt and doubt suspends the *ḥudūd* punishments. But the majority view here maintains that if the offender repents prior to completing the crime and turns away from it, and that if the crime in question is also one that involves a violation of the Right of God, but not if it involves a violation of the Right of Man or a private right, his repentance should be accepted.[22]

2. The second view which is held by the Imams Mālik and Abū Ḥanīfah as well as some Shāfiʿī and Ḥanbalī jurists maintains that repentance has no bearing on the *ḥudūd,* except in the case of banditry, which is based on a clear text of the Qur'an. This view is premised on the argument that the wording of the Qur'anic verse concerning the punishments of adultery and theft (in al-Nūr, 24:2, and al-Māʾidah, 5:38, respectively) are general (*ʿām*), which must apply to repenters and nonrepenters alike. When we read the text, for example, "as for the thief, male or female, cut off their hands," the text consists of a general provision and should be enforced in the same manner regardless of repentance. The proponents of this view maintain somehow that the references to repentance in the Qur'anic verses on theft and adultery are concerned with repentance after the imposition of punishment and not before. To this rather weak assertion, it is further added that when the Prophet ordered stoning in the cases of Māʿiz and al-Ghamidiyyah, or when he adjudicated in certain cases of theft, on the basis of confession, the offenders in these cases had all shown signs of remorse as many of them told the Prophet that they wished to be purified of their sins, but the Prophet nevertheless enforced the *ḥudūd* punishment on them. Thus it is concluded that although repentance is likely to lighten the offender's guilt in spiritual terms, it does not relieve him of the punishment. The proponents of this view have argued further that it is not reasonable to extend the logic of the Qur'anic text on repentance in *ḥirābah* by

> analogy to other offences. For *ḥirābah,* it is said again, somewhat unconvincingly, is sui generis in that prior to arrest the offender is out of the reach of law enforcement authorities and the incentive for him to repent and be exempted serve a good purpose, which is not the case in these other offences. For "the ordinary criminal is a person who can be subjugated anytime and there is no special incentive in his case to warrant suspension of the *ḥudūd* punishment on the ground of repentance."[23] Besides, to open the door of repentance in this way might lead to uncertainty and abeyance in the enforcement of *ḥudūd.* For any offender could be said to be capable of offering repentance in anticipation of suspension and delay in the execution of punishment.[24]

As already noted, some of the points in this view are less than convincing although not entirely without merit. The point to note, for instance, that banditry and terrorism are deemed to be totally different to other *ḥudūd* crimes is presumptive because, unlike other ordinary criminals who can be arrested anytime, the bandit/terrorist is out of reach of enforcement authorities and is, in any case, not likely to be as valid now as it might have been in earlier times. One might say the same about all other offenders in that the authorities have no effective control over criminals as such. The critique here is particularly relevant to repentance in inchoate crimes. No one, it may broadly be said, would know or have power over the criminal at that stage of his or her activity. We also have some reservations over the practical value of the proposed stipulation, which makes repentance admissible only prior to the completion of a crime. How does this sort of stipulation fit into the process and provide a realistic basis or a meaningful role for repentance? These are, it would seem, mostly unanswered questions. Abū Zahrah tells us that he has investigated many of these issues, and save for *ḥirābah,* he found no authority to confine the admissibility of repentance to a particular time frame, whether before or after the matter is brought to the attention of the court. Abū Zahrah concluded that it can indeed be after that event, despite the fact that jurists like Abū al-Ḥasan al-Māwardī (d. 450/1058) and Abū Yaʿlā al-Farrāʾ (d. 458/1066) have stated that it should be before. What Abū Zahrah is saying is that repentance may be during adjudication or before it, and this seems to be a balanced view to take. For otherwise the court would not have been given a meaningful role in the matter, and granting or rejecting repentance would be left to the prosecutor and police.[25]

And lastly, one notes in this argument the somewhat disjointed logic that the wording of the text in the relevant passages of the Qur'an is

conveyed in general terms and should therefore be closed to the whole idea of reformation and repentance. Yes, of course, these texts are general, but we also know that a general (*ʿām*) text may be specified and qualified in various ways by the preceding or succeeding portions of the text and that necessary exceptions may be made when it is suggested in the text itself. As it is, each one of the Qur'anic passages under review makes a provision for repentance mainly by way of exception (*istithnāʾ*), which means that its general application is qualified and specified in cases where taking a different course, that is, other than an undiluted emphasis on punishment, warrants consideration. This is perhaps one of the instances of taking a literalist approach to the understanding of scripture where the different segments of an otherwise logical whole are taken separately without there being a convincing argument to recommend such a course.

3. The third view, which is mainly attributed to Ibn Taymiyyah (d. 728/1328) and his disciple Ibn Qayyim al-Jawziyyah (d. 751/1350) of the Ḥanbalī school, maintains that punishment purifies one from criminality and sin, and so does repentance. That punishment should be suspended when the perpetrator of a Right of God offence repents and, in the meantime, does not himself insist that only the punishment can purify him of his guilt. But if he does so insist, then he or she may be punished even after repentance. Hence when the perpetrator of a *ḥudūd* crime repents prior to completing the crime, he or she will not be punished if the offence in question is a public right or Right of God offence, provided also that the offender does not demand to be punished. The proponents of this view have also stated, like the other two groups discussed above, that repentance does not have the same effect with reference to Right of Man offences, that is, crime that involves violation of private rights. In offences of this kind, such as slander (*qadhf*), it is not repentance but pardon that may be granted by the victim or his heirs that absolves the offender from punishment.[26]

Fatḥī al-Khammāsī has discussed the scholastic views in some detail and drawn the conclusion that one should look into the evidential basis of each opinion but also base one's preference on that which may be more suitable to one's own time and conditions. One may select a view that is more appropriate to the prevailing conditions of our society, even if it be a weak opinion, provided that it is founded on a valid evidential basis. Al-Khammāsī thus wrote, "Our choice is the position upheld by the Ḥanbalī

school and Imam al-Shāfiʿī, in one of his views at least," which is that repentance suspends the Right of God-based *ḥudūd* punishments, be it before or after arrest and prosecution. This would in effect include all the *ḥudūd* punishments except perhaps that of slanderous accusation, in which the Right of Man or private right is arguably more predominant. The Ḥanbalī position is clear on this, but al-Khammāsī adds that the Shāfiʿī position on this is not devoid of some ambiguity.[27]

When one looks at the evidence in the Sunnah, one finds that the Prophet has on many occasions tried to persuade persons who had confessed to a *ḥudūd* offence to retract their confession and find for them a way out of their punitive predicament, presumably because confession is often indicative of repentance and the Prophet has positively encouraged it. Yet there is no reference to repentance in the reported hadith of Māʿiz or al-Ghamidiyyah that says, for instance, that he or she had explicitly repented before the Prophet. Then to say that a confession is always tantamount to repentance is not a certainty, as there can be a different motive or story to a confession.

Only in the case of apostasy can it be said that repentance has found a place in the juristic doctrine of fiqh, but only just so, because imposing a strict time limit of three days prior to execution of punishment (see also Clause 23.3 of the Hudud Bill of Kelantan) within which the offender must repent is really reducing the concept of repentance to a mechanical formality that is almost meaningless. With reference to *ḥirābah*, the Qur'an has stipulated that repentance should take place before the criminal has been arrested, a stipulation that is reflective of the nature of this offence. For one who challenges the authority of a lawful government must willingly surrender, and that is when an opportunity can be granted for repentance. Surrender itself, one might say, can in most cases be equivalent to actual repentance. Clearly the logic of the Qur'an stands beyond dispute. The challenger to the constitutional authority of government may be so powerful as to put the government in a helpless situation, and surrender may play a crucial role in restoring normal order in that situation.

As for the rest of the *ḥudūd* offences, the Sunnah has proscribed intercession (*shafāʿah*), that is, intervention by others asking the authorities for a grant of forgiveness after the offence has been brought to the attention of the authorities. That said, intercession is, of course, different from repentance, and the Sunnah has not taken the same attitude concerning repentance. The Sunnah is, however, explicit on the point that, once a *ḥudūd* crime is reported to the authorities, it must be diligently

pursued, which must mean that the offender should neither be released nor pardoned because of intercession, considerations of social status, or an easy attitude to outside intervention. The Prophet was concerned with establishing the rule of law in a strongly tribalist environment and not necessarily with enforcing punishments in every case. This discussion contends that opening the door to repentance does not necessarily suggest a compromise on firmness nor on the deterrent attributes of the penal policy of *ḥudūd*, because all of these influences can play a role provided that one does not insist on reducing *ḥudūd* to a mechanical process—one that is made absolutely mandatory and precludes the opportunity of repentance in all cases.

Furthermore, in pre-Islamic times, Arab society was dominated by tribal influences, and tribal practices remained strong particularly in respect to crime and punishment. The Prophet/head of state tried to establish a new order wherein this area was no longer to be dominated by tribal law and practice. Hence his repeated emphasis, in regard to both intercession and repentance, that once the matter has been brought to his attention, tribal spokesmen must stop interfering. From that point onwards, the matter falls within the ambit of government authority and due process must be allowed to take its course. He did not totally overrule tribal authority; instead he conveyed the message that they could practice their own methods at the initial stages but must stop when the matter was brought to his attention. He was, in other words, drawing the line between the authority of the Medinan government under his leadership and the ever so pervasive tribalism that had historically dominated crimes and penalties. To read the hadith without contextualising the politics of the nascent state of Medina versus the tribal power of that time is likely to amount to unwarranted literalism, which still appears to dominate the jurisprudence of *ḥudūd*.

Juristic thinking over *ḥudūd* may not have taken into account these considerations, and it was probably caught, as from early times, in a web of technicality, partly because of linking *ḥudūd* with the binary division of rights into the Right of God and the Right of Man in a manner that created more problems rather than solving them. These juristic developments made it difficult to integrate the Qur'anic outlook on repentance and reform with the underlying philosophy of *ḥudūd*. One also notes discrepancy in the juristic doctrine regarding the two classes of rights. On one hand it is said that the Right of God is open to repentance and pardoning, as God Most High is forgiving

and merciful, but not the Right of Man, where repentance carries little weight and only the right-bearer can grant forgiveness. But then the opposite of this is asserted in regard to the *ḥudūd* —nearly all of which are Rights of God, and are as such not amenable to pardon or repentance!.

The repeated Qur'anic emphasis on repentance caught the attention of the key scholar of the Ẓāhirī school, Ibn Hazm (d. 456/1064), who wrote in a distinctly different tone of language to that of the majority of jurists:

> Since repentance is ordained by God and it is highly recommended, it is obligatory on all Muslims (*fariḍah ʿala kull-i muslim*) to invoke it in accordance with the injunctions (*al-nuṣuṣ*) that were discussed. Hence inviting the offender to repent prior to the enforcement of *ḥudūd* is an obligation and diligence in it is a duty. If the Imam [head of state] failed to invite the offender to repent prior to enforcement, an invitation to repentance should still be extended after the enforcement of *ḥudūd*.[28]

It is not certain as to what would be the benefit of repentance after the enforcement of *ḥudūd,* insofar as the punishment itself is concerned, except perhaps when it is seen as an act of merit that might earn spiritual reward, but it can also serve as a means of restoring social respect and public confidence in the sincerity of the repentant. In any case, Ibn Hazm's emphatic tone here clearly indicates that he saw an invitation to repentance as a Qur'anic obligation and an integral part of the penal policy of *ḥudūd*.

Tawfīq al-Shāwī, author of a four-volume encyclopedia on Islamic criminal law, has even more forcefully spoken on repentance to say that, by ignoring this aspect of Islamic criminal law, the fiqh scholars have turned a blind eye to the religious character of this discipline and to God's illustrious revelation that "made repentance obligatory and promised its acceptance out of His unbounded mercy." He intimates that there is a limit to the positivist thrust of fiqh, even though positivism has become even more pervasive, but "this is an impermissible aberration nevertheless [*hadha al-inḥirāf lā-yajūz*]."[29]

If one were to open the juristic concept of *ḥudūd* to the broader Qur'anic philosophy of repentance, rehabilitation, and reform, one would have to depart from the notion of the fixed and mandatory punishments of *ḥudūd* to a concept that is open to considerations of the offender's personality and past record as well as circumstantial evidence and other relevant factors the

court might consider important. It would be possible perhaps to combine the Qur'anic directives on repentance with the notion of fixed penalties, or a range of quantified penalties, while considering *ḥudūd* as the uppermost limits. It would be difficult, however, to integrate into this approach the notion of both fixed and mandatory sentences that are totally closed to the attendant conditions and circumstances of individual offenders and the society at large.

Ḥudūd *in the Sunnah*

This section explores several aspects of the hadith on *ḥudūd*, one of which is the occurrence or otherwise of the expressions *ḥadd* and *ḥudūd* therein. Here one notes in many hadith statements that the Prophet has used *ḥadd* and *ḥudūd* in reference to both specific crimes as well as punishments. But it seems that they have been used in reference to all punishments and not just a particular number or type of punishment. Whereas our foregoing review of the Qur'an verses has shown that the technical usage of *ḥudūd* in the sense of punishable crimes does not originate in the Qur'an, the information in the hadith is mixed, thus signifying both the technical and generic usages of *ḥadd* and *ḥudūd* in the sense of violation of the limits of acceptable behavior as well as crimes and punishments. The evidence reviewed in the following paragraphs occurs on five separate yet interrelated themes: (1) The Prophet himself has spoken about *ḥadd* and *ḥudūd* in a generic sense of transgressing the limits as well as its two other senses—crime and punishment, respectively. It remains uncertain, however, whether he has used these terms in the technical sense of fixed and unchangeable punishments that the fiqh scholars have used later. (2) The Prophet has stressed strict and impartial observance of the rule of law in relationship to penalties. (3) The Prophet has proscribed intercession (*shafāʿah)* concerning penalties. (4) The Prophet has also advised concealment of the nakedness of others (*satr al-ʿawrat*) including instances of *ḥudūd*. And (5) the Prophet has denounced broadcasting of evil conduct (*jahr bi'l-maʿāṣī*) including the *ḥudūd*.

Exploring these various aspects of the hadith literature relating to *ḥudūd* will serve to show that a degree of diversity is present in the language of hadith on *ḥudūd*. One does not, in other words, see the kind of predominantly punitive stress and lack of flexibility in the language of the hadith, as one later finds developing in the juristic doctrine of the leading schools on *ḥudūd*. The hadith speaks of stricture as well as forgiveness, of

combining moral advice with legal concerns, and of giving credit to the good deeds of people suspected of *ḥudūd*—with tangible results in the way they should expect to be treated. The Prophet has tried, whenever he noted signs of remorse on the part of the culprit, to turn a blind eye to instances of *ḥudūd* and even persuaded guilty persons to retract their confessions in a quest to exonerate them.

In a hadith recorded by al-Bukhārī, *ḥadd* has been used in the sense of a punishable offence. Abī Talhah has reported from the Companion, Anas b. Mālik:

> While I was with the Prophet, a man came and said, "O God's Messenger! I have committed a legally punishable act (*aṣabtu ḥaddan*), please apply the punishment on me." The Prophet did not ask him what he had done. Then the time for prayer fell due and the man offered prayer alongside the Prophet. When the Prophet finished the prayer, the man got up and said, "O God's Messenger! I have committed a punishable act; please inflict [the punishment] on me according to the Book of God." The Prophet said, "Have you not prayed with us?" He said, "Yes." The Prophet then said, "God has forgiven your sin" or said "your *ḥadd*—[reporter unsure]."[30]

عن أنس بن مالك رضي الله عنه قال : كنت عند النبي (ص) فجاءه رجل فقال :يا رسول الله إني أصبت حدأ فأقمه على قال ولم يسأل عنه قال وحضرت الصلاة فصلى مع النبي (ص) فلما قضى النبي (ص) قا م إليه الرجل فقال يا رسول الله إني أصبت حدأ فأقم في كتاب الله قال اليس صليت معنا ؟ قال نعم قال إن الله قد غفر لك ذنبك, أو قال حدك.

The Prophet's response in this case was in typical conformity with the Qur'an, which advised, for instance, with reference to admitting repentance even from unbelievers: "But if they repent and keep up prayer and pay the zakah, leave their way free. Surely God is Forgiving, Merciful" (al-Tawbah, 9:5).

And a few passages later in the same chapter of the Qur'an, one reads on a broader note.

> But if they repent and keep up prayer and pay the zakah, they are your brethren in faith. Thus do We explain the signs in detail for those who understand. (al-Tawbah, 9:11)

فَإِن تَابُوا وَأَقَامُوا الصَّلَاةَ وَآتَوُا الزَّكَاةَ فَإِخْوَانُكُمْ فِي الدِّينِ ۗ وَنُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَعْلَمُونَ.

When the man said twice, "I have fallen into an *ḥadd-aṣabtu ḥaddan*," it is likely that by *ḥadd* he meant a Qur'anic offence, which was, however, not specified. But in the succeeding phrase, "then apply it (i.e., the *ḥadd*) on me (*fa-aqīmhu ʿalayya*)," it seems that the reference is to the punishment. This is further confirmed in the repeated plea when the man said to "apply on me [the punishment] according to the Book of God." All that this hadith tells us regarding the usage of *ḥadd* is that it was used on this occasion in both senses of an offence and a punishment. The man probably knew what it was but neither he nor the Prophet spelled it out, apparently due to the Prophet's desire not to expose the conduct in question. This leaves an element of ambiguity in the hadith in that it remained unclear as to what the guilty man had actually done. Al-Nawawī has said in his commentary of *Ṣaḥīḥ Muslim*, who recorded this hadith, that the transgression involved was a minor one that called for an unspecified *taʿzīr*, which is why it was exonerated by the prayer (*ṣalāh*) that followed. Had it been an *ḥadd* crime, it would not be omittable by *ṣalāh*. Qāḍī ʿIyāḍ has commented that the meaning of the *ḥadd* in question remained unclear, and the Prophet did not enquire into it as he practiced "concealment" (*satr*) and did not want to expose it.[31]

In a similar hadith reported on the authority of Wāthilah b. al-Asqaʿ, Wāthilah said:

> I saw the Messenger of God, pbuh, and was with him one day when a man came to him saying, "O God's Messenger! I have committed an *ḥadd* of God's prohibited *ḥudūd*. The Prophet turned away from him. Then he turned to him again, and the Prophet turned away from him, then he said the same to the Prophet a third time, and again he turned away from him. Then it was time for prayer. When the prayer ended, the man told the Prophet a fourth time that he had committed a *ḥadd* of the *ḥudūd* God had prohibited, so apply to me God's (ordained) punishment. The Prophet then said to him: "Did you not do your ablution (*wuḍūʾ*) well—for you prayed with us just now! Go away, that is your expiation (*kaffārah*)."[32]
>
> شهدت رسول الله صلى الله عليه وسلم ذات يوم وأتاه رجل فقال : يا رسول الله ، إني أصبت حدا من حدود الله تعالى ، فأعرض عنه ، ثم أتاه الثانية فأعرض عنه ثم قالها الثالثة فأعرض عنه ، ثم أقيمت الصلاة ، فلما قضى الصلاة أتى الرابعة ، فقال : أصبت حدا من حدود الله فأقم في حد الله قال : ألم تحسن الطهور - أو الوضوء - ثم شهدت الصلاة معنا آنفا ؟ اذهب فهي كفارتك.

What is of interest here is that the Prophet did not pursue the matter and declared that God had forgiven "the *ḥadd*" in question—on at least two reported occasions. Here the word *ḥaddak* (your punishment) is probably used interchangeably with *dhanbak* (your sin). As it is, this hadith does not support the idea that, as a Right of God, *ḥadd* is unpardonable nor that it is absolutely mandatory.

In another hadith, which is recorded in *Ṣaḥīḥ Muslim, ḥadd* occurs in the sense only of crime rather than punishment. Abī Burdah al-Anṣārī reported, in an agreed-upon hadith, that he heard the Prophet saying:

> No one shall be flogged above ten lashes unless it be for a *ḥadd* among the *ḥudūd Allāh*.[33]

عَنْ أَبِي بُرْدَةَ اَلْأَنْصَارِيِّ - رضى الله عنه - أَنَّهُ سَمِعَ رَسُولَ اَللَّهِ - صلى الله عليه وسلم -يَقُولُ " لَا يُجْلَدُ فَوْقَ عَشَرَةِ أَسْوَاطٍ, إلَّا فِي حَدٍّ مِنْ حُدُودِ اَللَّهِ" مُتَّفَقٌ عَلَيْهِ

Ḥadd in this hadith is most likely used in the sense of a crime, which is also likely to be inclusive of *ḥudūd* crimes that are expounded in the Qur'an.

In yet another hadith, which Abū Yūsuf (d. 182/798) has recorded in his *Kitāb al-Kharāj*, the Prophet has authorised suspension of the *ḥudūd* in cases of uncertainty and doubt. Abū Yūsuf has discussed the hadith in some detail and said that a number of Companions have reported it. Al-Tirmidhī, al-Bayhaqī, al-Suyūṭī, and al-Tabrīzī have also recorded the same hadith, which is as follows:

> ʿĀʾishah reported that the Prophet, pbuh, said: "Avoid condemning the Muslims to *ḥudūd* whenever you can, in all instances of doubt, and when you can find a way out for a Muslim, then clear his way. If the Imam errs, it is better that he errs on the side of forgiveness than on the side of punishment."[34]

عن عائشة رضي الله عنها عن النبي (ص) إدر أوا الحدود بالشبهات من المسلمين ما استطعتم فإن كان له مخرجاً فخلوا سبيله فإن الإمام أن يخطئ في العفو خير من أن يخطئ في العقوبة .

Abū Yūsuf has also recorded, on the same page, a slightly shorter version of the same hadith where he stated that a number of Companions and Followers have reported it. The shorter version reads:

> Drop the *ḥudūd* in cases of doubt as far as you can. For it is better to err in forgiveness then making an error in punishment.
>
> إدرأوا ا لحدو د بالشبهات ما استطعتم والخطأ في العفو خير من الخطأ في العقوبة .

This shorter version is broader in scope as it omits the reference to Muslims, thereby making it clear that the message contained in it is meant to be for all people. Abū Yūsuf has also stated that the Prophet consistently discouraged people from accusing each other of conduct that carried a prescribed punishment. *Ḥudūd* in this text can be a reference to prescribed punishments by that name or indeed to any punishment. It is common knowledge that on numerous occasions and whenever a person confessed to an *ḥudūd* offence the Prophet tried to persuade him or her to retract his or her confession and has in this way shown a consistent disinclination toward the imposition of penalties. While elaborating on this, Abū Yūsuf has recorded a statement of the second caliph ʿUmar b. al-Khaṭṭāb: "I prefer to suspend rather than implement the *ḥudūd* in cases of doubt."[35] A separate section in the following discussion advances a perspective on the subject of doubt in the context of *ḥudūd,* but first a few words may be said on intercession.

The most renowned case of intercession (*shafāʿah*) that hadith scholars have recorded is that of Fāṭimah bt. al-Aswad b. ʿAbd al-Asad, better known as al-Makhzumiyyah, as earlier mentioned, of Quraysh nobility, who had committed theft. Quraysh tribal leaders were dubious as to who could intercede on her behalf knowing that the Prophet did not encourage intercession in religious offences. They decided to ask Usāmah b. Zayd, who was very close to the Prophet; they thought he might be able to persuade the Prophet to pardon al-Makhzumiyyah. However, Usāmah's intercession angered the Prophet, who told him, "O Usāmah, are you interceding regarding a punishment ordained by God?" It also turned out that Usāmah, who was a teenager at the time, had actually acted on something he did not know much about, especially with reference to the limits of intercession. The Prophet did not stop there but convened a congregation to address them with his famous statement as follows:

> Abū 'l-Walīd reported to us from al-Layth, from Ibn Shihāb, from ʿUrwah, from ʿĀ'ishah, that Usāmah spoke to the Prophet concerning a woman, the Prophet, pbuh, said: "People before you perished because they would inflict the legal punishment (*ḥadd*) on the

poor and let the rich go free. By Him in whose hand my soul rests! If Fāṭimah, Muḥammad's daughter, committed theft, I would cut off her hand."[36]

حَدَّثَنَا أَبُو الْوَلِيدِ، حَدَّثَنَا اللَّيْثُ، عَنِ ابْنِ شِهَابٍ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ، أَنَّ أُسَامَةَ، كَلَّمَ النَّبِيَّ صلى الله عليه وسلم إِنَّمَا هَلَكَ مَنْ كَانَ قَبْلَكُمْ أَنَّهُمْ كَانُوا يُقِيمُونَ الْحَدَّ عَلَى الْوَضِيعِ، وَيَتْرُكُونَ الشَّرِيفَ، فَقَالَ وَالَّذِي نَفْسِي بِيَدِهِ لَوْ فَاطِمَةُ فَعَلَتْ ذَلِكَ لَقَطَعْتُ يَدَهَا.

Al-Bukhārī, who recorded this hadith, elaborated: when Usamah saw the Prophet's anger over his intercession, he apologised profusely, saying that he was mistaken. The woman was duly punished, and she used to come to the Prophet for guidance. The reference to "people before you" in the hadith is to Jews who used to punish the weak but were lenient on the rich and powerful. This incident, it is further added, occurred on the day of the conquest of Mecca (in the eighth year of the Hijrah). It then became firmly established that intercession was not permitted in crimes after they had been reported to the authorities, nor were authorities themselves permitted to accept intercession or to grant a pardon on its basis. But intercession to government authorities was allowed in private/civil litigation outside the sphere of crimes and penalties. This is known as "benevolent intercession" (*shafāʿah ḥasanah*), which was approved of in the Qur'an as in the following verse: "Whoever recommends/intercedes and helps a good cause becomes a partner therein. And whoever recommends and helps an evil cause, shares in its burden. And God has power over all things" (al-Nisāʾ, 4:85).

مَّن يَشۡفَعۡ شَفَٰعَةً حَسَنَةٗ يَكُن لَّهُۥ نَصِيبٞ مِّنۡهَاۖ وَمَن يَشۡفَعۡ شَفَٰعَةٗ سَيِّئَةٗ يَكُن لَّهُۥ كِفۡلٞ مِّنۡهَاۗ وَكَانَ ٱللَّهُ عَلَىٰ كُلِّ شَيۡءٖ مُّقِيتًا.

Other hadith reports recorded in the main collections also confirm that the Prophet encouraged intercession in good causes, and those who did so were commended for it. Intercession in crimes and punishments was also allowed, but only prior to reporting to the authorities.[37]

It seems that by referring to "people before you" and how they handled crimes, the Prophet did not refer to the Qur'anic punishments or any particular type of Islamic punishment for that matter—as the reference was to the Jewish people. The text of this hadith is definite on the point that *ḥadd* in the hadith quoted above was used interchangeably with punishment in reference to people to whom the Qur'an did not apply. What the hadith tells us is that there must be no discrimination in the enforcement

of legal punishments, and the Prophet spoke emphatically that the law will apply with a total sense of objectivity, thereby marking a complete departure from the discriminatory practices of the past.

Another aspect of the hadith on intercession is the recurrent advice therein that people should not show eagerness in the reporting of offences to authorities but try to gracefully conceal and turn a blind eye to them. But even when an offence is reported, the judge may not impose any punishment unless there is clear proof by way of confession or impartial witnesses. According to a hadith on the authority of ʿAbd Allāh b. ʿAbbās, the Prophet had said the following concerning a woman of ill-repute: "If I were to stone anyone without proof, I would have stoned so and so (*fulānah*), for doubts surrounded her and her condition, and those who visited her."

لَوْ كُنْتُ رَاجِمًا أَحَدًا بِغَيْرِ بَيِّنَةٍ لَرَجَمْتُ فُلَانَةَ فَقَدْ ظَهَرَ فِيهَا الرِّيبَةُ فِي مَنْطِقِهَا وَهَيْئَتِهَا وَمَنْ يَدْخُلُ عَلَيْهَا.

This hadith is recorded by Ibn Majah, where it is clarified that "doubt surrounded her" meant her reputation for lewdness, and the person referred to was the wife of Hilal b. Umayyah. The latter is known to have cursed his wife. The advice of restraint in this hadith (that one must have proof before one acts) is not only addressed to the general public but also to law enforcement authorities and judges who should themselves observe the rule of law and shariah, just as the Prophet did himself, concerning the enforcement of penalties.

According to yet another hadith on the subject of concealment (*satr*), "One who conceals the nakedness of a believer, God will conceal his nakedness in this world and the hereafter."[38]

من ستر مسلما ستره الله في الدنيا والآخرة.

Several other hadith reports are found on "concealment of the nakedness of others" (*satr al-ʿawrat*), and their collective message concurs on the point of making *satr al-ʿawrat* an entrenched aspect of the ethos of Islam firmly grounded in the Qur'an and Sunnah.[39] To quote the Qur'an:

> Those who love to see scandal broadcast among the believers, will have a grievous penalty in this life and in the hereafter. God knows and you know not. (al-Nūr, 24:19)

إِنَّ ٱلَّذِينَ يُحِبُّونَ أَن تَشِيعَ ٱلْفَـٰحِشَةُ فِى ٱلَّذِينَ ءَامَنُوا۟ لَهُمْ عَذَابٌ أَلِيمٌ فِى ٱلدُّنْيَا وَٱلْـَٔاخِرَةِ ۚ وَٱللَّهُ يَعْلَمُ وَأَنتُمْ لَا تَعْلَمُونَ

The substance of this message extends to all sins and crimes, including *ḥudūd*, which is that they should neither be broadcast nor eagerly and hurriedly reported to the authorities. The Muslim community is thus expected to exercise restraint in exposing the weaknesses of those who have fallen into error. The offender himself is similarly advised to avoid broadcasting his evildoing. This is the subject of "broadcaster of evil" (*mujāhir bi'l-maʿāṣī*), an allied theme of *satr al-ʿawrat*, which also features prominently in the sources. The Qur'an thus denounces those who speak openly about their sinful conduct (al-Nisāʾ, 148). Those who broadcast something they might have done away from the public eye, in conditions of privacy, but then publicise it and speak openly about it clearly do something that should be avoided. People are similarly instructed in the explicit language of a hadith to be assiduous in making concealment (*satr*) a part of their ethical outlook and conduct in social relations:

> O People! You must now end violating God's limits (*ḥudūd Allāh*), and forsake these detestable acts (*al-qādhūrāt*). But one who commits them, let him be shielded by God's protective cover. For otherwise, when the matter becomes known to us, we shall implement the Book of God on its perpetrator.
>
> يأيها الناس قد آن لكم أن تنتهوا عن حدود الله، من أصاب شيئاً من هذه القاذورات فليستتر بستر الله، فإنه من يبد لنا صفحته نقم عليه كتاب الله تعالى.

Al- Jazīrī, who quoted this hadith, follows it with this observation: The more openly that criminality and evil are talked about in a society, the more it is likely to mar the moral fabric of that society. For the perpetrator has evidently lost the sense of modesty and restraint that would otherwise deter him from talking openly about it. He does so before God's illustrious presence showing little regard for His limits as well as belittling the moral vision of the society. By doing so the evildoer is effectively inciting others to do what he has done. In another hadith, the Prophet has reportedly said: "All of my Ummah is exonerated except the broadcasters of evil [كل أمتي معافى إلا المجاهرين]". *Mujāharah* (broadcasting) is when a person does something evil at night, then wakes up the next day and announces openly that which God had shielded in His protective grace. People of moral probity who are modest would be inclined, on the contrary, to be remorseful and try to abandon the evil they might have fallen into and conceal it.[40]

A question arose with regard to a witness who sees a crime happening before his eyes—whether he should report it or keep quiet about it. In a conversation between two leading Companions, Abū Ayyūb al-Anṣarī and ʿUqbah b. Amīr, the governor of Egypt, it transpired that the witness had the option as to whether to exercise the recommended concealment (*satr*) or to expose and report the incident.[41] It seems that concealment is advised unless the witness is called upon to testify, but the matter would much depend on the nature of the conduct in question. If it is something that is particularly damaging to the general public or committed in an outrageously indecent or oppressive manner, it may be no longer be optional for the witness to conceal. The moral advice of recommended silence is also extended to a physician who knows for a fact that a man is infertile and yet his wife has become pregnant. It is not advisable for him to declare that the wife had become pregnant due to adultery. He may even run the risk of being charged with slander if he declares the matter and fails to prove his claim by four witnesses. Similarly, if the physician knows of a woman who disposes of her illicit infant in a certain way, he is not under obligation to declare it, lest it become a means of greater harm to the woman and her family. However, if the physician knows that his patient is afflicted with a contagious disease, he is duty-bound to declare this in order to prevent harm to others before it happens.[42]

Ḥadd *(Limit) and* Ḥaqq *(Right)* in *the Juristic Expositions of Fiqh*

Juristic developments concerning Islamic criminal law and the *ḥudūd* punishments of concern to us can be seen in two areas: one is a move away from the Qur'anic references to repentance and reform; and the other is development of a discourse on the binary division of rights into the Right of God and Right of Man (*ḥaqq Allāh* and *ḥaqq al-ādamī*), respectively. The first of these has already been expounded in the discussion of repentance in the previous sections. That analysis will be kept in mind, but the focus here is on the second theme and how it has impacted and narrowed down the concept of *ḥudūd*. An attempt is then made to recapture the original Qur'anic conception of *ḥudūd* as God's limits in the Qur'an.

Muslim jurists have defined *ḥadd* as a fixed/quantified punishment (*ʿuqūbah muqaddarah*) imposed for violation of the Rights of God.[43] By defining *ḥadd* as a fixed punishment, it is meant that the punishment is invariably

specified and fixed but also not fixed in the sense of fixing minimum and maximum limits for it. The main purpose of laying down a fixed punishment of this kind is to ensure that no one—whether the victim, the judge, or head of state—has any authority to increase or decrease the punishment.

The designation of *ḥadd* in the juristic doctrine of fiqh as the Right of God, in contradistinction with the Right of Man, also meant that the victim or his family may not pardon, reduce, or adjust the punishment. This is unlike *qiṣāṣ* (retaliation) and *diya* (blood money), which are classified as Rights of Man and allow the victim or his legal heirs to reduce, adjust, and even grant a pardon concerning them. The Right of God here signifies a right that belongs to the community and has a bearing on its vital interests, security, and welfare. If anyone grants a pardon or concession over *ḥudūd* they are ultra vires.

This is in contradistinction with the *taʿzīr* punishment in which state authorities and judges are entitled to exercise discretion in determining the quantum of punishment. Protecting the vital interests of the community, one may add, is the basic objective of all punishment, including *ḥudūd, qiṣāṣ, diya*, and *taʿzīr*. Yet while this is generally acknowledged, it is implied that, compared to *ḥudūd*, punishing offences in these other categories are not seen as crucial for protecting the basic fabric of society. Yet they relate more closely to the rights and interests of individuals than that of the community as a whole, even though it is acknowledged that the two categories of rights and interests can hardly be totally separate from one another.[44]

It is of interest to recount here how ʿAbd al-Qādir ʿAwdah (d. 1373/1954), author of a renowned two-volume textbook on Islamic criminal law, reiterates the conventional fiqh doctrine and some of the questionable premises on which it is based. ʿAwdah thus wrote that theft, drinking (*shurb*), highway robbery, rebellion, *zinā*, and apostasy pose a greater threat to society than the pain and grief they might inflict on their victims. A victim of theft may lose his property but his grief is relatively light compared with the terror and insecurity inflicted on his neighbours and fellow citizens. As for crimes such as "murder and injury, they affect the individuals more than the society and these are to some extent personal crimes in the sense that their perpetrators do not face everyone they meet with violence but confine their aggression to a particular individual." ʿAwdah continues: "If the criminal cannot reach his victim, he does not go on attacking others. Even when the aggression does take place, it does not

shake the community nor does it have a serious impact on its security." To quote ʿAwdah:

> When the thief, for example, strikes in pursuit of material gain, he may steal from anyone; if he does not get what he wants from one victim, he goes after another, without necessarily aiming at a particular individual. For what the thief is after is property in the hands of all individuals. This is also true of *zinā*, for the perpetrator of *zinā* is not after a particular woman as such but any woman, and if he cannot reach one woman he will search for others.[45]

The passage quoted here is part of the basic argument often seen in the fiqh manuals advanced for the purpose of distinguishing the *ḥudūd* crimes as a separate category and labelling them as exclusive manifestations of the Right of God. The rationale cited here does not really bear out and would, in any case, seem to have lost much of its force in contemporary times. For it is grounded in the questionable assertion that killing and bodily injury represent a lesser threat to society than such other crimes as theft, adultery, and slander.

Ḥadd in the fiqh manuals is described as a crime that violates the Right of God, the limits He has laid down, and the punishment He has specified. Abū Zahrah (d. 1974) explains this by giving examples of *zinā* and *qadhf*: These are offences that violate the vital interests of the community, that is, protecting the family and the purity of lineage within it, in the case of *zinā*, and the good name and reputation of its law-abiding citizens—in the case of *qadhf*. Both of these offences, on the other hand, have aspects that also involve the personal rights and interests of individuals, or the Right of Man, but these are relatively less significant compared to the threat they pose to law and order in the community. One might even be persuaded to think, Abū Zahrah continues, that *zinā* does not necessarily involve violation of personal rights of individuals, especially when it occurs between two unmarried persons. This line of analysis is extended, mutatis mutandis, to other *ḥudūd* crimes in support of the argument that they all consist, first and foremost, of violation of the community's rights.[46]

If there is a force in this argument, then it is submitted that it is not unique to *zinā* nor to *ḥudūd* as such but that it relates, in varying degrees of course, to all crimes within or outside *ḥudūd*. Any crime, it may be said, is likely to threaten the rights and interests of both the community and

its members. Then to put them under two separate categories as such is a speculative exercise.

When one looks at the *ḥudūd* punishments as a separate category of punishments in contradistinction with *qiṣāṣ*, one is reminded of the conditions that prevailed in the tribalist environment of Arabia at the advent of Islam. The manner in which *qiṣāṣ* was practiced and implemented often meant that personal vendettas and a tribalist urge for revenge transgressed the essence of just retaliation. The Qur'anic reform of *qiṣāṣ* laid emphasis on the objectivity of justice and maintenance of law and order independently of tribalist and sectarian interests. The *ḥudūd* punishments would appear to have also served this purpose in that, in regards to a certain number of crimes, they took the law out of the scope of tribal justice to clearly convey a message that these crimes were not open to negotiation. But when one considers that the course of history has altered the picture—and massive changes have taken place as a result of such developments as urbanisation, communications, and modern methods of government—one finds that the basic rationale of the early distinctions has been substantially eroded.

While criminality poses a serious threat to the fabric of society and civilisation, there is no compelling argument to confine this only to a handful of specified or unspecified crimes. The changing conditions of society have never ceased to generate new problems, new opportunities for crime, and unprecedented varieties of criminal behaviour, which are often no less of a threat to the basic fabric of society and its values than *ḥudūd* crimes. Would it not be right, one might ask, to classify irresponsible dumping of industrial waste and radioactive pollutants, international drug trafficking, and human trafficking as violations of the Right of God and the vital interests of the community! These may even be seen as far more serious than perhaps some of the *ḥudūd* offences such as drinking and slander.

The basic distinction between the Right of God and the Right of Man is often determined based on a preponderance of the respective interests of the individual and those of the community. Assigning a particular interest or right to one or the other of these is often a matter of juristic opinion, and it is open to subsequent revision and adjustment, perhaps in line with the realities of social change. Even the specific definitions of *ḥudūd* and its varieties, it may be said, are based on juristic opinion. It is known, of course, that the Qur'an has determined specific punishments for certain offences. But thus defining *ḥudūd* crimes and relating them to the Right

of God and Right of Man has consequences that ensue from these formulations are instances of juristic construction. They might have served a good purpose at one time, but the Muslim community and its scholars should be free to make further adjustments in line with the prevailing needs and conditions of their own society and generation—as they are not determined by the scripture.

In an essentialist sense, all rights in Islam, as the Mālikī jurist al-Qarāfī (d. 684/1285) has rightly pointed out, consist primarily of the Rights of God, which are in turn exercised and represented by the community of believers and their lawful government.[47] One may conclude therefore that all crimes consist of violations of the limits of God, the *ḥudūd Allah,* and that the community and its leadership are within their rights to take all necessary measures to defend their common interests against criminality and violence without the need to draw hard and fast divisions between God's rights and man's rights as such. One may also add that there remains no urgent need for distinguishing the Rights of God from the Right of Man, nor of *ḥudūd* crimes on this basis alone from other offences that are equally if not more threatening to public security and interest. It would seem difficult also to extend this binary distinction with a degree of accuracy to new crimes such as human trafficking, hijacking of passenger airlines, and Mafia-like crime syndicates that kidnap people and terrorise communities.

A certain degree of confusion in the juristic understanding of *ḥudūd* has thus been caused by linking this concept with that of *ḥaqq Allāh*. From very early times, probably the mid- or late second century Hijrah/eighth century CE, juristic doctrine had clearly identified *ḥadd* as a Right of God in contradistinction with *qiṣāṣ,* which was a Right of Man.[48] It seems that juristic thought along these lines was influenced by the attempt to draw a parallel between the two notably similar ideas of *ḥudūd Allāh* and *ḥuqūq Allāh*.The former was present in the text and the latter is a juristic rejoinder. It then seemed just another step along that path, even more questionable perhaps, to identify *qiṣāṣ* as the Right of Man in contradistinction with *ḥudūd*. To say that *ḥudūd* are God's limits is accurate, but to say that they are God's rights is not. *Ḥadd* and *ḥaqq* are two different concepts and it is proposed here that they be retained as such. Although the claim of the victim or his legal heirs to seek just retaliation (*qiṣāṣ*) was confirmed in the Qur'an, it seemed doubtful whether this could be taken to justify the bipolarity of rights that marked the juristic approach to the classification of crimes on that basis.

One can naturally understand the difference between a civil or a private claim and a crime, which is a public rights issue and is not open to the same influences as a civil claim. But the division between God's Right and Man's Right is not as clear-cut as that, simply because rights and obligations in Islam, whether public or private, are rooted in the structure of values determined in the textual specifications of the Qur'an and hadith. The bipolarity of rights in juristic thought seemed decidedly at odds with the all-embracing, unitarian, and integrationist influence of *tawḥīd,* the idea that all rights take their origin from the same source. Hence any duality that is depicted in the basic scheme of rights could not have been devoid of a measure of speculation. Once the fiqh scholars had placed the *ḥudūd* and *qiṣāṣ* respectively under the Right of God and Right of Man categories, the need was evident for an intermediate category that could subsume the offences that were not covered by either. The new category of *taʿzīr* was introduced to cover every other offence that did not fall under either *ḥudūd* or *qiṣāṣ*.

Although juristic doctrine had initially little difficulty in classifying *ḥudūd* under the *ḥaqq Allāh* and *qiṣāṣ* under *ḥaqq al-ādamī,* the relationship of *taʿzīr* with one or the other of these was not immediately clear. To identify *qiṣāṣ* as a violation purely of the latter was evidently controversial. For it made little sense to classify murder as a violation only or even predominantly of the Right of Man and theft as a violation only of the Right of God—as if property carried greater value than human life! Furthermore, to classify murder as the Right of Man seemed totally oblivious of the clear text of the Qur'an, which declared killing another human being a crime against the whole of humanity:

> Whoever slew a person, unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole of humankind, and if any one saved a life, it would as if he saved the life of the whole of humankind. (al-Māʾidah, 5:35)

مَن قَتَلَ نَفْسًا بِغَيرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحيَاهَا فَكَأَنَّمَا أَحيَا النَّاسَ جَمِيعًا.

Fiqh manual writers somehow thought it always important to identify the Rights of God and Rights of Man content of all crimes, because it was on this basis, as they thought, that the sentencing policy of the judges must be determined. Questions as to whether or not an offence was pardonable and

whether the judge or head of state could exercise discretion in the determination of punishment—and whether the wishes of the victim and his personal conditions carried any weight in determining the fate of the accused and so on—were determined by ascertaining the relationship of the offence type or category with the Right of God and Right of Man respectively.

A basic confusion had already set in regarding the understanding of the Qur'anic concept of *ḥudūd Allāh* as a reference exclusively to fixed punishments. Yes, the Qur'an did provide quantified punishments for a small number of offences, but it was most likely not the Qur'an's intention to confine the *ḥudūd Allāh* to these offences nor to suggest *ḥudūd* as an offence category in contradistinction with *qiṣāṣ* nor indeed with offences that were later labelled as *taʿzīr*. There was no reason why the limits of God (*ḥudūd Allāh*) should not have retained its general meaning as a basic philosophy of punishment that was reflective of the broader understanding of the Qur'anic outlook. To say that *ḥadd* is an offence that is not open to adjustment, repentance, or pardon after it is reported to the authorities, thereby closing the door on the whole idea of repentance, rehabilitation, and reform in the face of clear Qur'anic references to these, marked the beginning of a basic imbalance. Yet juristic thought hardly looked back to amend and rectify these in line with subsequent developments. If the Prophet had issued certain instructions that specified a number of crimes to be prosecuted once brought to his attention, this too was most likely intended to emphasise the rule of law vis-a-vis the all-too-pervasive tribal power than to establish rigidities of the kind that juristic thought stipulated over the course of time.

Another instance of inconsistency in the juristic formulation of *ḥudūd* was that *ḥadd,* by definition, referred to an offence for which the Qur'an or Sunnah prescribed a quantified punishment, yet in the face of this definition liquor drinking (*shurb*) and, according to some, even mutiny (*bagha* or *bugha*) were still classified as *ḥudūd* offences despite the fact that neither the Qur'an nor the Sunnah had prescribed or quantified a punishment for them.

It is a questionable approach to also see that the three-tiered division of crimes into *ḥudūd, qiṣāṣ,* and *taʿzīr* originated in the assumption that if crimes were defined by the punishment they carried it would really be putting the cart before the horse. Crime should naturally be defined by reference to the nature of the conduct, its moral enormity, and the suffering or harm it inflicts on its victim and society, and only then should a punishment be determined for it and not vice versa. For the punishment-based

approach puts one at a loss with regard to a new crime that may have no known punishment. The fiqh manual writers seem to have started from a position of distinguishing *ḥudūd* and *qiṣāṣ* by reference to such criteria as to whether or not the punishment was fixed or variable, who had the right to grant a pardon and forgive, and what sort of violation did they represent, of the Right of God or the Right of Man—all refer more to consequences and classifications rather than the nature of conduct. The punishment-based approach also fails to respond to findings such as that punishment severity is not necessarily linked to reduction in crime rates. One also notes that a heavily punitive approach would not offer the best option to accommodate the balance of influences that one detects in the Qur'an. There is admittedly no comprehensive data available about the effectiveness of *ḥudūd* in combating crime as most of the Muslim countries surveyed here do not apply *ḥudūd* consistently enough to provide a reliable basis for analysis. Criminality in the modern urban/industrial environment relates to a variety of new factors that may not have existed in traditional societies. Issues need to be seen in their proper settings, and suitable philosophical approaches to punishment should be taken to meet the more complex set of conditions associated with criminality in changing times.

The Qur'an offers a set of guidelines for a more comprehensive theory of punishment, which is inclusive of retribution, rehabilitation, and reform, and also that punishment must be commensurate to the suffering inflicted. Crime is strictly seen as an individual matter (e.g., al-Anʿām, 6:164), yet patience and forgiveness are recommended on the part of both the victim and the judge. Punishment severity and firmness in its application is always to be moderated by the demand for justice and fairness (*al-ʿadl wa'l-iḥsān*—Q. al-Naḥl, 16:90). The basic policy on punishment is thus stated in such terms as the following; "And if you decide to punish, then punish with the like of that with which you were afflicted. But if you show patience, that is indeed the best [course] for those who remain patient" (al-Naḥl, 16:126; al-Baqarah, 2:194).

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُم بِهِ ۖ وَلَئِن صَبَرْتُمْ لَهُوَ خَيْرٌ لِّلصَّابِرِينَ.

The basic message of this text is general and need not be confined to the context only of *qiṣāṣ*. The verse evidently discourages eagerness in the application of all punishment. Patience (*ṣabr*) can either mean a reflective pause that delays hasty conclusions or abstaining from rash decisions so as to allow time for reflection and the possibility of repentance and

pardoning as the case may be. But then when it is said that repentance has no place in *ḥudūd*, one risks going against the clear text of the Qur'an. The substance of the message before us is even more vividly conveyed in another verse, where one reads "and the recompense for an injury is an injury equal to it. But one who forgives and reconciles, his reward is with God, for God loves not the transgressors" (al-Shūrā, 42:40).

وَجَزَاءُ سَيِّئَةٍ سَيِّئَةٌ مِّثْلُهَا ۖ فَمَنْ عَفَا وَأَصْلَحَ فَأَجْرُهُ عَلَى اللَّهِ ۚ إِنَّهُ لَا يُحِبُّ الظَّالِمِينَ.

In contrast with the exclusive emphasis on retribution and deterrence that characterises the juristic doctrine on *ḥudūd*, the Qur'an takes a blended approach to punishment, one that is open to a variety of other influences, such as forgiveness, restraint, mending, and reform, all of which may be necessary for the formulation of a comprehensive penal policy. This is, we believe, a dynamic philosophy and outlook that can relate more meaningfully to contemporary realities than the juristic doctrines of fiqh that have moved in questionable directions.

It may be concluded from the foregoing analysis that this division of rights does not offer a sound basis for distinguishing the *ḥudūd* punishments from other punishments, if only because there is no satisfactory formula as to what are the Rights of Humans and what are the Rights of God and what precisely constitutes the violation of one separately from the other or, indeed, if they can be meaningfully separated as such.

From his own enquiry into the theory of *ḥudūd* punishments, Fazlur Rahman has drawn the conclusion that if one were to apply the basic concepts of deterrence, rehabilitation, and reform in the interest of striking a balanced and adequately diversified approach to punishment, one would not only observe the original outlook of the Qur'an on *ḥudūd* but also avoid in the meantime a great deal of inconsistency and confusion that should not have arisen in the first place.[49]

This chapter concludes with a selection of fiqh legal maxims (*qawāʿid kulliyyah fiqhiyyah*) relating to punishments and some of the fiqh specifications on *ḥudūd* that underline the basic contours of juristic thought on the subject. Legal maxims are characteristically concise and confined to a declaration of principles. They are often extracted from the more detailed formulations of fiqh on a variety of topics, some general and others more specific. Yet the fiqh maxims are on the whole instructive and educational. They do not bind the judge, yet they play an exceedingly important role in juridical decision-making and *ijtihād*.

Legal Maxims on Ḥudūd

- "When the *ḥudūd* are brought to the attention of ruler or judge, punishment falls due and no intercession is accepted."[50]
  - إذا رفعت الحدود للإ مام و القاضي فلا شفاعة ووجب الحد.
- "*Ḥudūd* [punishments] are not enforced without the order of the head of state [or his representative]."
  - لا تقام الحدود إلا بأمر الأمام.
- "The Rights of God are predicated in easiness unlike the Rights of Man [which are not]."
  - حقوق الله مبنية على المسامحة بخلاف حقوق الأدميين.
- "The Right of Man is not omitted except by means of pardon or waiver."
  - حق العبد لايسقط إلا بالعفو والإبراء.
- "A person may exercise indulgence [waive or forgive] in his own rights but not with regard to the rights of others."
  - يسمح الإنسان في حقوق نفسه وليس له المسامحه في حق غيره.
- "*Ḥudūd* [punishments] are amalgamated prior to enforcement but not thereafter."
  - يتدخل الحد قبل إقامته لا بعد.
- "Retaliation is indivisible."
  - القصاص لا يتجزأ.
- "Retaliation is not omitted by way of expiry but there is disagreement concerning the *ḥudūd*."
  - القصاص لا يسقط بالتقادم وفي الحدود خلاف.
- "When the victim of killing has no heir, the head of state retaliates on his behalf."
  - من قتل ولا وارث له إقتص له الإمام.
- "When the direct perpetrator and proximate causer are both present, the ruling falls on the direct perpetrator."
  - إذا اجتمع المباشر و المتسبب يضاف الحكم للمباشر.
- "The norm [of shariah] is freedom from liability."
  - الأصل براءة الذمة
- "*Ḥudūd* [punishments] are suspended when there is doubt."
  - الحدود تسقط بالشبهات.
- "One who unknowingly drinks alcohol is not liable either to the *ḥadd* [punishment] or *taʿzīr*."
  - من شرب خمرا جاهلا به فلا حد ولا تعزير.

- "One who doubts whether he did something or did not, the norm is that he has not done it."
  - من شك هل فعل شيئا أو لا؟ فالأصل أنه لم يفعل.
- "Doubt does not suspend *taʿzīr* punishment, but it does suspend expiation."
  - الشبهة لا تسقط التعزير وتسقط الكفارة.
- "A purpose of the *ḥudūd* is to inflict pain."
  - الحدود المقصود بها الزجر.
- "In what is not amenable to substitution [and divisibility], choosing a part is tantamount to choosing the whole, and omitting a part is also tantamount to omitting the whole."[51]
  - ما لا يقبل التعويض يكون اختيار بعضه كإختيار كله و إسقاط بعضه كإسقاط كله.
- "Prevention is stronger than remedy."[52]
  - الدفع أقوى من الرفع.
- "When two things from one genus coexist and their purpose is not different, the one is amalgamated into the other."[53]
  - إذا إجتمع أمران من جنس واحد, ولم يختلف مقصودهما, دخل احد هما في الأخر.
- "Settlement of litigations and disputes is an obligation."
  - قطع الخصومة والمنازعة واجب.
- "The norm is to prefer the version of one who supports the apparent, and evidence is on the shoulder of one who claims the opposite of that."
  - الأصل أن من ساعده الظاهر فالقول قوله والبينة على من يدعي خلاف الظاهر.
- "The norm is to hear the word of the one who defends his property."
  - الأصل أن يسمع بقول دافع ماله.
- "Enforcement of the prescribed *ḥudūd* is authorised by the head of state."
  - إ قامة الحد للإمام.

IV

Prescribed Ḥudūd *Crimes*

Preliminary Remarks

This brief chapter presents an overview of prescribed *ḥudūd* crimes and punishments as specified in the Qur'an and the issues that will be discussed in subsequent chapters.

The succeeding chapters draw attention to issues many Muslim jurisdictions face in the implementation of *ḥudūd*, especially regarding the manner in which flogging and other prescribed punishments are administered. Another aspect discussed refers to procedural issues over the enforcement of *ḥudūd* and the uncertainty that exists over determining the precise number of *ḥudūd* offences when applying punishments.

The chapter on adultery addresses some of the unresolved issues regarding the distinction of rape from *zinā* that many Muslim countries are experiencing. Other issues to be discussed relate to the juridical distinction between married and unmarried persons (*muḥṣan* and *ghayr muḥṣan*, respectively) and problems that originate in admitting pregnancy as the sole proof of *zinā*.

Muslim jurists have also engaged in lengthy debates over the validity of stoning to death (*rajm*) as the punishment of *zinā*, on which the Qur'an is silent. The chapter presents a review of the scriptural evidence and contributions of twentieth-century Muslim scholars on these issues. The discussion proceeds to examine, in a series of chapters, issues that arise with regard to theft, wine drinking, slanderous accusation, apostasy, and banditry/terrorism.

The discussion in this part of the volume generally takes an issue-oriented approach. Issues are identified and then addressed in light of the

data in the sources that are examined. An analysis of the scriptural data is then espoused with reviews of contemporary opinion on the pertinent issues.

The chapter on theft, for example, begins with a review of the Qur'an and hadith, and proceeds with the definition of theft and how the two components of this offence, namely of the Right of God and Right of Man, play out in a modern legal system. Questions also arise over the meaning of "guarded property" (*māl muḥraz*), the actual concept of safeguarding (*ḥirz*), and whether amputation of the left foot for the second offence of theft has convincing shariah validity.

A similar stock-taking applies to the discussion of slanderous accusation (*qadhf*), one of which is whether slander consists of the violation of private rights or public rights, and the chapter provides an overview of the scholastic positions on this issue. Questions are also encountered in determining the position of a non-Muslim in regards to slander/*qadhf* that may in some ways differ from the viewpoint of a Muslim.

Subsequent chapters review issues relating to apostasy (*riddah*) and consumption of liquor (*shurb*). One aspect of the discussion is concerned with the question whether these matters should be considered *ḥudūd* crimes at all and why they were included in the first place. Both of these offences also raise issues over the position of non-Muslims and the basic and wider issue in apostasy over the freedom of religion.

With regard to banditry and terrorism (*ḥirābah*), which is a capital offence, questions arise over the admissibility or otherwise of repentance, whether or not *ḥirābah* can only be committed outside main cities, whether its perpetrators must be armed and able to carry out their crimes, and whether a legitimate government must also exist. Questions have also arisen over the type and sequence of the fourfold punishment the Qur'an has stipulated for *ḥirābah* and conditions that should be present for each of these to apply. The responses to these questions are based on the scriptural evidence, juristic views of the leading schools of law, both Sunni and Shia, and contemporary opinion. Whether the Qur'anic conception of *ḥirābah* can provide effective responses to issues of global terrorism and atrocities committed by groups such as Boko Haram, al-Shabab, al-Qaeda, the Taliban, and ISIS! The chapter concludes with a reminder that the menace of terrorism the world is facing today is not a question entirely of legality. Legal questions need to be considered, of course, but the larger challenges humanity faces arise from the lawless world of adventurist

individuals and states, irresponsible drone attacks, and other acts of aggression. The result has been massive loss of life and vast numbers of displaced people and refugees who suffer within their own countries and abroad and who desperately quest for an abode of peace. The scale and intensity of human tragedy witnessed due to these acts of aggression is simply disillusioning.

V

Zinā *(Adultery and Fornication)*

Meaning and Attributes of Zinā

Zinā in shariah is inclusive of fornication (consensual sexual intercourse between unmarried adults) whereas adultery is extramarital sex. *Zinā* is defined as illicit sexual intercourse outside of marriage that involves actual penetration of a man's sexual organ into that of a woman with both knowing that they are prohibited to one another. Initially the Qur'an penalised adultery with imprisonment and detention of the accused women in their houses "until death came to them, or God ordained for them some other way" (al-Nisāʾ, 4:15), provided that the charge was proven by the testimony of four upright witnesses. This was taken to mean a temporary measure awaiting a more definite pronouncement, which subsequently came in sura al-Nūr (24:2), and determined 100 lashes of the whip for both parties as standard Qur'anic punishment for the offence. In both of these two separate verses, the emphasis on repentance and reform is clearly articulated. Later it was claimed that the second of these punishments (of 100 lashes) was abrogated with respect to married persons by the Sunnah of the Prophet, who ordered stoning to death (*rajm*) for a married adulterer. This meant that the Qur'anic 100 lashes remained applicable only to unmarried adulterers. A general consensus (*ijmāʿ*) was also claimed, although disputed by many, for this instance of abrogation.[1] These issues will presently be examined side by side with such other questions that have also arisen concerning married persons, admissibility or otherwise of pregnancy as proof of adultery, issues over rape, and whether banishment (*tabʿīd*) can still be upheld as a supplementary punishment for a convicted adulterer.

In addition to its clear prohibition in the Qur'an and hadith, adultery is labelled as the gravest of Major Sins (*akbar al-kabāʾir*), only lesser than the association of other deities with God (*shirk*) and murder (*qatl*). The Qur'an praises "those who invoke not, with God, any other deity, nor slay life that God has made sacrosanct, except for a just cause, nor commit adultery" (al-Furqān, 25:68).

وَٱلَّذِينَ لَا يَدْعُونَ مَعَ ٱللَّهِ إِلَٰهًا ءَاخَرَ وَلَا يَقْتُلُونَ ٱلنَّفْسَ ٱلَّتِى حَرَّمَ ٱللَّهُ إِلَّا بِٱلْحَقِّ وَلَا يَزْنُونَ.

The verse continues to accentuate the enormity of the three crimes it mentions by painful punishment in the hereafter. But then it is added in the succeeding passage: "Unless the perpetrator repents, believes, and works righteous deeds. Then God will change the evil of such persons into good, and God is forgiving, most merciful" (25:70).

إِلَّا مَن تَابَ وَءَامَنَ وَعَمِلَ عَمَلًا صَٰلِحًا فَأُو۟لَٰٓئِكَ يُبَدِّلُ ٱللَّهُ سَيِّـَٔاتِهِمْ حَسَنَٰتٍ ۗ وَكَانَ ٱللَّهُ غَفُورًا رَّحِيمًا.

This combination of repentance and its actual return to a changed life of devotion and righteous work is further emphasised in the same passage: "And whoever repents and does good has truly turned to God with an [acceptable] conversion [or self-emendation]" (25:71).

وَمَن تَابَ وَعَمِلَ صَٰلِحًا فَإِنَّهُۥ يَتُوبُ إِلَى ٱللَّهِ مَتَابًا.

Every step that leads to adultery and brings one closer to it must also be avoided: "Nor come close to adultery; for it is a lascivious deed, and an evil opening the road [to other evils]" (al-Isrāʾ, 17:32).

وَلَا تَقْرَبُوا۟ ٱلزِّنَىٰٓ ۖ إِنَّهُۥ كَانَ فَٰحِشَةً وَسَآءَ سَبِيلًا

In a Bukhārī hadith, it is reported from the prominent Companion, ʿAbd Allāh b. Masʿūd: "I asked the Messenger of God, pbuh: which sin is the gravest in the eyes of God? And he said 'when you associate another deity with God your Creator.' I asked further 'Then what else?' And he said 'to kill your offspring for fear of feeding on your food'; and I said: Then what else? And he said: 'to commit adultery with your neighbour's woman.' "[2]

Based on these and similar other indications in the sources, Muslim jurists have identified certain degrees of gravity for adultery. Thus it is held that adultery committed with a married woman is a heavier transgression

than that with an unmarried woman. If the woman happens to be a neighbour, the enormity of adultery intensifies as it also combines disgrace and ill-treatment of one's neighbour, which is a transgression in its own right. Should the neighbour also happen to be a relative, adultery combines both the latter and also incest, thus further intensifying the enormity of the crime. The Prophet has stressed in a hadith: "One whose neighbour is not safe from his evil-doing shall not enter Paradise."[3]

لايدخل الجنة من لا يأمن جاره بوائقه.

The act becomes even more ugly in the event where the neighbour is away for devotional purposes such as the hajj, pursuit of knowledge, and jihad. This is the subject, in particular, of a hadith wherein the Prophet has been quoted to have spoken on the predicament of those who commit the prohibited act.[4] The enormity of adultery is further intensified if it takes place in certain special times and places, such as during the month of Ramadan, in a sacred place like the mosque, or at Friday prayer times.

Proof of Adultery by Witnesses and Confession

Adultery is provable by witnesses and confession and, notwithstanding some reservations, also by pregnancy. As for proof by witnesses, Muslim jurists are in agreement that there must be four male eyewitnesses of probity who have not undergone a *ḥudūd* punishment themselves. The number must be no less than four as per Qur'anic stipulation (al-Nisāʾ, 4:15). This textual specification at four is also the basis of the conclusion that women's testimony is not admitted—and if it were, the number would have to change, which would also mean a departure from the text, although the Shia Imamiyyah accepts testimony of three male and two female witnesses. They must all testify seeing actual penetration of the male organ into the woman's vagina in explicit words clear of all ambiguity and allusive language. Their testimony must also concur on the precise timing and place where and when the intercourse took place (city, town, locality, house, etc.; if in a room, exactly where, such as a corner, middle, direction; also the day of the week, date and time, etc.). Any discrepancy with respect to these details would, according to both the Sunni and Shii laws, vitiate the testimony altogether. The number of four witnesses is peculiar to adultery, as there is no such requirement for any other crime including

murder and theft, and the fact that its conditions are also made extremely difficult to obtain is expressive of the Lawgiver's desire for requital and concealment. If all four witnesses testify that they saw the act of adultery but then the woman is found to be a virgin, testimony is vitiated. All four witnesses must testify in one and the same court session before the judge, and in identical terms. In the event of a material discrepancy, they would themselves be liable to the punishment of slander (*qadhf*). Should any of the four witnesses testify in one session and the rest in another, their testimony will not be admissible according to the Ḥanafīs, Mālikīs, and the Shia Imamiyyah. They must all come together to the same court session, although the Shāfiʿī and Ḥanbalī schools do not stipulate this and admit the possibility of them either coming individually to the court session or all together. The Mālikīs have further added that, after their collective testimony before the court, when the witnesses have departed and then each one is asked to recount what they said and they differ from one another, their testimony is nullified and they will themselves become liable to the punishment of slander. Testimony should preferably be fresh without involving a lapse of time that would weaken its reliability. In the event where one (or more) of the witnesses retracts his testimony after having given it, the testimony collapses altogether and no punishment can be imposed. The Ḥanafīs also maintain that testimony in *zinā* collapses with the death or disappearance of one of the witnesses even after it is given any time before sentencing.[5]

Muslim jurists are also in agreement over confession as a proof of adultery based on the Sunnah of the Prophet, who implemented the prescribed punishment on Māʿiz b. Mālik and al-Ghamidiyyah on the basis of their confession. But then by virtue of the same precedent, it is held that confession must be repeated four times, and the Ḥanafīs have further stipulated that the four instances are not at once but in four separate court sessions. The Mālikī and Shāfiʿī schools do not insist on separate sessions. Confession must in all cases be explicit and detailed such that it eliminates all doubt and suspicion of falsehood. For the Prophet is known to have asked Māʿiz in such terms, "Maybe you only kissed, looked at or touched her!" And in another report he has said, "Until your organ penetrated hers completely! And did you know what adultery was [i.e., if it was unlawful]!"[6]

Confession can be retracted at any stage, and once retracted or denied, it cannot be proven by the testimony even of four witnesses of verification. Thus if someone denies he made a confession, and then witnesses come forth and assert that he did make a valid confession and even repeated it

four times, this kind of testimony is inadmissible. For denial in this case creates a doubt (*shubha*) and the prescribed punishment is suspended because of it. Personal knowledge of the judge or of the Imam (head of state) does not prove claims of adultery and there is general agreement on this. The most one can say would be that he (the Imam or judge) is counted as one witness and three others will be needed to create the basis of an admissible proof.[7]

Issues over Rape, Its Evidence, and Proof

Muslim jurists are in agreement to the effect that a woman who has been raped and subjected to irresistible force is not liable to any punishment. This is based on the authority of the following hadith:

> God will not take to task my community for their mistake, forgetfulness and what they have been compelled into.[8]
>
> إن الله تجاوز عن أمتي الخطأ والنسيان وما استكرهوا عليه.

Also quoted in support is a hadith on the authority of ʿAbd al-Jabbar b. Wāʾil from his father who said: "A woman was compelled [into *zinā*] during the time of the Prophet, pbuh, and he dropped the *ḥadd* in her case."[9]

Another version of this hadith gives the following details:

> When a woman went out for prayer at dawn, a man attacked her on the way and raped her. She shouted but the rapist escaped. When another man came by, she complained: "That man did such and such to me."
>
> And when a company of the Emigrants came by, she said: "That man did such and such to me." They went and seized the man whom they thought had raped her and brought him to her.
>
> She said: "Yes, this is the man." Then they brought him to the Messenger of God.
>
> When he (the Prophet) was about to pass sentence, the man who (actually) had raped her stood up and said: "Messenger of God, I am the man who did it to her."
>
> He (the Prophet) said to her: "Go away, for God has forgiven you." But he told the man some good words [Abū Dāwūd said: meaning the man who was seized], and of the man who had had intercourse with her, he said: "Stone him to death."

> The Prophet then said (concerning the man who confessed): "He has repented such a repentance that if [it were divided among] the people of Medina, it would have been accepted from them."
>
> Abū Dāwūd said: "Asbat b. Naṣr has also transmitted it from Simak."[10]

حَدَّثَنَا مُحَمَّدُ بْنُ يَحْيَى بْنِ فَارِسٍ، حَدَّثَنَا الْفِرْيَابِيُّ، حَدَّثَنَا إِسْرَائِيلُ، حَدَّثَنَا سِمَاكُ بْنُ حَرْبٍ، عَنْ عَلْقَمَةَ بْنِ وَائِلٍ، عَنْ أَبِيهِ، أَنَّ امْرَأَةً، خَرَجَتْ عَلَى عَهْدِ النَّبِيِّ صلى الله عليه وسلم ثُرِيدُ الصَّلاَةَ فَتَلَقَّاهَا رَجُلٌ فَتَجَلَّلَهَا فَقَضَى حَاجَتَهُ مِنْهَا فَصَاحَتْ وَانْطَلَقَ فَمَرَّ عَلَيْهَا رَجُلٌ فَقَالَتْ إِنَّ ذَاكَ فَعَلَ بِي كَذَا وَكَذَا وَمَرَّتْ عِصَابَةٌ مِنَ الْمُهَاجِرِينَ فَقَالَتْ إِنَّ ذَلِكَ الرَّجُلَ فَعَلَ بِي كَذَا وَكَذَا . فَانْطَلَقُوا فَأَخَذُوا الرَّجُلَ الَّذِي ظَنَّتْ أَنَّهُ وَقَعَ عَلَيْهَا فَأَتَوْهَا بِهِ فَقَالَتْ نَعَمْ هُوَ هَذَا . فَأَتَوْا بِهِ النَّبِيَّ صلى الله عليه وسلم فَلَمَّا أَمَرَ بِهِ قَامَ صَاحِبُهَا الَّذِي وَقَعَ عَلَيْهَا فَقَالَ يَا رَسُولَ اللَّهِ أَنَا صَاحِبُهَا . فَقَالَ " اذْهَبِي فَقَدْ غَفَرَ اللَّهُ لَكِ " . وَقَالَ لِلرَّجُلِ قَوْلاً حَسَنًا . قَالَ أَبُو دَاوُدَ يَعْنِي الرَّجُلَ الْمَأْخُوذَ وَقَالَ لِلرَّجُلِ الَّذِي وَقَعَ عَلَيْهَا " ارْجُمُوهُ " . فَقَالَ " لَقَدْ تَابَ تَوْبَةً لَوْ تَابَهَا أَهْلُ الْمَدِينَةِ لَقُبِلَ مِنْهُمْ " . قَالَ أَبُو دَاوُدَ رَوَاهُ أَسْبَاطُ بْنُ نَصْرٍ أَيْضًا عَنْ سِمَاكٍ

The Prophet thus accepted the solitary statement of the raped woman and did not ask her for further proof of witnesses to support her claim. She was also not charged of making a false accusation of adultery against another person, nor was there any mention of *qadhf*. The accused person was charged with rape because of the victim's claim, but he was convicted through his own confession to the charge.

It is also reported that a case was brought to the second caliph ʿUmar b. al-Khaṭṭāb of a woman who claimed that she was a heavy sleeper, that a man had forced himself on her while asleep and had intercourse with her, and she did not know it until she woke up and also had no clear memory of her attacker. The caliph did not enforce the *ḥadd* of adultery on her and accepted her explanation. This was seen as an instance of doubt (*shubha*) and the *ḥadd* punishment was suspended because of it. The argument is then extended to a scenario if she also got pregnant as a result—would that be used as a proof against her? In response it is said that pregnancy under the said conditions would also be deemed as doubtful and that it would not be enough to invoke the punishment unless it was reinforced by confession or other objective evidence. This is the majority (*jumhūr*) position upheld by the Ḥanafī, Shāfiʿī, and Ḥanbalī schools, simply because of the possibility of *shubha*. The Mālikīs have held, on the contrary, that pregnancy in an unmarried woman is by itself a proof of *zinā* and that the punishment would be due on its basis unless there be evidence to prove that the woman was subjected to irresistible force. When there is such evidence, then the *ḥadd* of adultery is suspended.[11]

The view, however, that pregnancy is a conclusive proof of *zinā* has aroused controversy as it can lead to miscarriage of justice. Instances have thus arisen when the victim of rape was unable to prove the charge of rape against her attacker and was herself subjected to punishment. This is because her charge of rape is often taken as an implied confession of adultery and made the basis of invoking the punishment on her. Then again, if the rape victim fails to prove her charge against the rapist by four witnesses, which is the most likely scenario, she is charged with slander (*qadhf*). An often-cited case in point is that of Safia Bibi of Pakistan. In 1985, Safia Bibi, a sixteen-year-old, nearly blind domestic servant, reported that she was repeatedly raped by her employer and his son and became pregnant as a result. When she charged the man with rape, the case was dismissed for lack of evidence, as she was the only witness against them. Safia, however, being unmarried and pregnant, was charged with *zinā* for not having conclusive evidence to show that the pregnancy was because of rape. The session court at Shahiwal district convicted her for *zinā* and sentenced her to three years' rigorous imprisonment, fifteen lashes, and a fine of Rs.1000.[12] Is this not miscarriage of justice?

A question arose whether duress in the case of a man also absolves him from the standard punishment. A basic answer to this question is in the affirmative on the assumption that duress applies to both. This response refers to the authority of the foregoing hadith, which does not draw an exception in the case of men, and also because the claim of duress would in any case give rise to a doubt (*shubha*) and suspend the punishment. This is the position taken by the two disciples of Imam Abū Ḥanīfah, a minority view of the Mālikī and preferred view of the Shāfiʿī school. The majority view of the Mālikī and Ḥanbalī schools and some Shāfiʿīs maintain that the case of a man is different as erection cannot materialise without an element of volition and consent—hence he is liable to punishment.[13]

Imam Abū Ḥanīfah has made an exception for compulsion by the Sultan "under pain of the sword," a position that does not apply to other government officials. The Imam's disciples and other leading scholars of the Ḥanafī school have thought differently, however, and held that times have changed, adding that perhaps what the Imam wrote was good for his time but that compulsion can originate from the sultan or any other person in effective power. The Shāfiʿīs, Mālikīs, and Ḥanbalīs also maintain that duress may be from the sultan or from any other person, government official or otherwise.[14]

According to another report, a woman who was struck with severe thirst in the desert asked a shepherd for a drink, but he refused to serve her any milk unless she had intercourse with him. The woman gave in to his demand and had intercourse with the shepherd. When the case was brought before the caliph ʿUmar b. al-Khaṭṭāb, he did not enforce the punishment on either of them, on the assumption that the milk would be her dower and, since there was an element of consent, a temporary but voidable (*fāsid*) marriage could be assumed in their case, which provided the basis of a doubt and the suspension of punishment.[15] The assumption here worked to the benefit of the shepherd, as the woman who had acted due to necessity would have also had a separate ground for a defence.

It is further stated in this connection that when a man hires a woman to have intercourse with him and she agrees and they have intercourse, the prescribed punishment of adultery would not apply, but they may be punished by way of a deterrent *taʿzīr* punishment.[16] This is again a case of doubt created by the existence of a quasi-contract (*shibh al-ʿaqd*), similar perhaps to the previous case.

Notwithstanding the well-established position of scholastic jurisprudence that refuses to admit circumstantial evidence in the proof of *ḥudūd*, an exception has been made in the case of pregnancy and rape. Rape can be proven by the fact of pregnancy if there is no other explanation, but the victim is allowed to rebut the charge and bring forth supportive evidence. Imam Mālik has actually held that the victim's claim of rape is not proven unless it is buttressed by evidence such as bleeding or screaming or other reasonable indicators to show that the victim was raped against her will.[17] For the majority of juristic schools, it is unlikely in any case that she will be punished with the fixed punishment, since her statement that she was raped, even if unsupported, gives rise to a doubt (*shubha*). Another ground for doubt, at least under the Ḥanafī and Shāfiʿī laws, could be if the woman has confessed only once but not four times, as a single confession is not enough for a conviction.[18]

Zinā can also be proven through the process of imprecation (*liʿān*), that is, when a man accuses his wife of adultery and disowns her child and then takes four solemn oaths in support of his accusation. The prescribed punishment may be applied to her if she does not refute the claim, but the punishment is suspended if she refutes the claim and takes four solemn oaths in support of her refutation.[19] This is incidentally cited by some scholars as a case where a woman's testimony overrules that of a man.

Yet by excluding circumstantial evidence in the proof of *ḥudūd*, mainstream fiqh would also stand to preclude important scientific evidence like semen stains, vaginal swabs, blood samples, scratch marks, genetic fingerprinting, and so on, which would presumably fall under circumstantial evidence and therefore be inadmissible as proof in *zinā*. Modern opinion is critical of this, side by side with the inadmissibility of female witnesses in the proof of *ḥudūd* crimes.

One commentator noted, on both of these issues, namely precluding female witnesses and material circumstantial evidence, that the mainstream fiqh position (as also in the case of the Hudud Bill of Kelantan 1993), go against not only scientific knowledge but also the Qur'anic position, which clearly records the presence of a single female witness plus material circumstantial evidence to solve an accusation of rape.[20] A reference is made here to sura Yūsuf (12:23–29), the story in particular of Prophet Yūsuf, who was accused by a woman of seducing her after she herself had failed to seduce him. This issue was solved by just one female witness and circumstantial evidence when it was pointed out that, since Prophet Yūsuf's shirt was torn from behind, it must have been the woman who attempted to seduce him.[21] This is ironically the basic Qur'anic authority that Muslim jurists have generally quoted in support of circumstantial evidence (*qarāʾin*) as a method of proof for crimes outside the *ḥudūd* category.[22]

A Malaysian researcher, Nik Noriani, has scrutinised the position of female witnesses in the Qur'an (al-Nūr, 24:4) and drawn the conclusion that the requirement of four witnesses in this verse was specially meant to protect women against slander and casual accusation of *zinā* "and not to protect men from charges of rape."[23] The fact that mainstream fiqh disqualifies women as witnesses in all *ḥudūd* cases and just retaliation (*qiṣāṣ*), it was added, also had no precedent in the Prophet's practice. There were cases in which the Prophet accepted women's evidence, such as the case of a girl who had been robbed and brutally assaulted and the case of a woman who was raped by an unknown man on her way to the mosque for the dawn prayer.[24]

Another Malaysian observer, Norani Othman, raised a question over the objectivity of justice and whether the fiqh exclusions of female testimony and acceptance of pregnancy as a proof of *zinā*, which are both followed without change in the Malaysian draft laws, fail to be equitable and just. "The purpose of all laws, God's law as well as man-made law, is to dispense justice." These positions need to be carefully scrutinised, not just by "a selected number" of religious scholars but through wider

participation of the ummah.[25] While sharing the same sentiment, Nakhaie Ahmad referred to the ubiquitous emphasis on the objectivity of justice in the Qur'an and then tersely stated, "If a Muslim is exhorted to be just towards an enemy, he should surely be just also to women."[26]

To explore the scholastic position on the evidential value of pregnancy a little further, it will be noted that the majority (*jumhūr*) have classified pregnancy as circumstantial evidence of the occurrence of *zinā* on the part of an unmarried woman, in the case of one who is married but whose husband is incapable of being a fertile partner; or when there is a child born within the first six months of marriage. Pregnancy is not decisive circumstantial evidence (*qarīnah qāṭiʿah*) in that it cannot on its own be the basis of adjudication, but it is circumstantial evidence (*qarīnah)* that can be rebutted by other evidence. The law thus leaves open the possibility of its rebuttal. The court may hear evidence to prove that pregnancy has occurred without *zinā,* or that sexual intercourse has occurred under duress, by mistake, or even without the knowledge of the defendant. When this is proven, the prescribed punishment of *zinā* must be suspended, and there may well be no case for any punishment. Should there be a possibility that pregnancy occurred without penetration, the *ḥadd* punishment must again be suspended. This may happen, for instance, when semen is planted in a woman by artificial methods, either by herself or by another person, or through sex without penetration. The case will be all the more credible if the woman is still found to be a virgin. The Imams Abū Ḥanīfah, al-Shāfiʿī, and Ibn Ḥanbal have held that when all of these possibilities are eliminated, the woman should be asked if she has any explanation; and if she herself claims that she was either mistaken or compelled, the fixed punishment will be suspended. There will be no *ḥadd* punishment even if she did not make such a claim so long as she has not made a full confession.[27]

If a woman accused of *zinā* is asked whether she was compelled and she says, "I was forced into *zinā*" or "I acted under a mistake," her words are to be admitted and no *ḥadd* is to be applied on her. This is because shariah prefers concealment (*satr*) in the *ḥudūd*. Al-Jazīrī who wrote this also added that this should be the position even if she had initially made a confession. For the fiqh rules clearly allow the accused who makes a confession to retract it, especially if the latter claims duress as a reason for doing so.[28]

The majority position—to admit pregnancy as circumstantial evidence—is based on a saying of the Companion (*qawl al-ṣaḥābi*), a statement in particular of caliph ʿUmar b. al Khattab, who is reported to have

said that "stoning is obligatory on anyone who commits *zinā,* man or woman, provided that they are *muḥṣan* [lit., guarded, i.e., married] and that it is proven by witnesses, pregnancy or confession." It is similarly reported that it came to the attention of the third caliph ʿUthmān that a married woman had given birth to a child upon expiry of only six months from the date of her marriage. ʿUthmān was of the view to convict the woman to punishment by stoning, but ʿAlī b. Abū Ṭalib advised him against it and cited the Qur'anic verse (al-Aḥqāf, 46:15) that declared that the carrying of the child to his weaning takes thirty months. Elsewhere in the Qur'an it is also stated that mothers shall breastfeed their offspring for two whole years (al-Baqarah, 2:233). Reading these two verses together, ʿAlī b. Abū Ṭalib concluded that a period of six months was the minimum duration of pregnancy, and the woman who had given birth upon completion of six months was not to be convicted of *zinā*.

Imam Mālik has, as already noted, considered pregnancy as a conclusive proof of *zinā* above the category of circumstantial evidence. The defendant's claim as to compulsion and mistake will not be enough to suspend the punishment unless it is confirmed by supportive evidence. Thus her claim of compulsion and rape will be upheld if it is supported by circumstantial evidence such as screaming and calling for help, signs of violence, and bleeding from loss of virginity or otherwise.[29]

Muhammad Sidahmad is supportive of acceptance of women's testimony generally, including in *ḥudūd* offences. He argues that it would be irrational if an Islamic judicial system today were to reject the testimonies of women living in a hostel strictly prohibited for men. These women may witness a rapist or a male stalker in the full act of *zinā* in circumstances where no one else can act as witness. It is a matter of serious concern, Sidahmad adds, that this gender limitation in the proof of *ḥudūd* crimes is likely to help criminals who may even use it to avoid the *ḥudūd* punishment altogether.[30]

Furthermore, the possibilities of accident, error, and abuse are in many ways greater today than in premodern times. There is general availability, for instance, of artificial insemination, test tube pregnancy, and semen banks that keep alive and preserve semen for very long periods; thus there are increased possibilities for falsification and fabrication. Although signs of virginity cannot survive actual childbirth, it is possible, according to expert opinion, for sexual intercourse, and also pregnancy, to take place and the hymen to remain intact. Modern medicine has also made it possible to repair, through surgery, the hymen after perforation.

The availability of modern medical facilities pertaining to pregnancy, prenatal care, and childbirth has meant that women tend to spend more time in hospital beds, maternity care units, and outside the home environment. They are often put under anaesthetics, pain-relieving drugs, and so on. Under these circumstances, the possibility is even greater for accidents and abuse to take place without a woman's knowledge or even with her knowledge but under compromised circumstances. It would therefore seem rather presumptuous to regard pregnancy as a conclusive proof of *zinā*.

In response to a question on whether the DNA (*basmah warathiyyah*) can provide decisive answers to some of the queries raised over pregnancy as the proof of *zinā*, Wahbah al-Zuḥaylī noted that DNA analysis may identify the other party to *zinā* but it cannot eliminate doubt about the presence of mistake, fabrication, and duress. The reliability or otherwise of the DNA and other scientific means of establishing facts, next to traditional methods of witnessing and confession in the *ḥudūd* and *qiṣāṣ* prosecutions, enrich and equip the legal process with new and reliable means. These matters are not entirely juridical issues but also related to scientific knowledge and need to be recognised.

Wahbah al-Zuḥaylī admits the impressive contribution of DNA analysis in crime detection and identification of criminals, but he holds that for purposes of court decisions, unless the law takes a decisive position otherwise, "the DNA does not provide independent evidence in the sense of the court issuing a sentence solely on its basis, but it does provide supportive and persuasive evidence for a court decision."[31] This is a sound response, as DNA evidence can be tampered with, and its reliability is also diminished with the lapse of time between collection of evidence and the actual incident.

*Definition of a Guarded Person (*Muḥṣan*)*

Muḥṣan as a derivative of *iḥṣān* refers to a person who is "immune," or protected against the temptations of *zinā,* because of Islam and marriage. Muslim jurists have premised the distinction between *muḥṣan* and non-*muḥṣan* on the (somewhat exacting) rationale that once a person has experienced the joy of marriage he is bound to be eager to safeguard and protect the sanctity of that precious relationship, regardless as to whether there was an effective or functioning marriage at the material time the offence was committed.[32] The Ḥanafī and Ḥanbalī schools

require that, for the punishment of stoning to be applicable, both partners must have this status. The Shii law is significantly different in its definition of a *muḥṣan*, who is defined to be an adult, free Muslim who is in a position to have lawful sexual intercourse and whose partner is actually available and not absent on a journey, imprisoned, or similar other circumstances.[33]

Sexual intercourse under Islamic law is permitted in a valid marriage only, such that any sexual intercourse outside this context is most likely to fall under *zinā*. The Qur'an penalises *zinā* and slanderous accusation of *zinā* as in the following verse:

> The adulterer and adulteress, flog each of them a hundred lashes. Let not compassion move you in their case from carrying out God's law, if you believe in God and the Last Day. And let a party of the believers witness their punishment. . . .And those who lay a charge against a chaste woman, and produce not four witnesses [to prove it] flog them with eighty lashes, and do not admit them to be witnesses ever again, for they are evil-doers. Except for those who repent thereafter and reform, for indeed, Allah is Forgiving and Merciful.
>
> (al-Nūr, 24:2–5)

ٱلزَّانِيَةُ وَٱلزَّانِى فَٱجْلِدُوا۟ كُلَّ وَٰحِدٍ مِّنْهُمَا مِاْئَةَ جَلْدَةٍ ۖ وَلَا تَأْخُذْكُم بِهِمَا رَأْفَةٌ فِى دِينِ ٱللَّهِ إِن كُنتُمْ تُؤْمِنُونَ بِٱللَّهِ وَٱلْيَوْمِ ٱلْءَاخِرِ ۖ وَلْيَشْهَدْ عَذَابَهُمَا طَآئِفَةٌ مِّنَ ٱلْمُؤْمِنِينَ ... وَٱلَّذِينَ يَرْمُونَ ٱلْمُحْصَنَٰتِ ثُمَّ لَمْ يَأْتُوا۟ بِأَرْبَعَةِ شُهَدَآءَ فَٱجْلِدُوهُمْ ثَمَٰنِينَ جَلْدَةً وَلَا تَقْبَلُوا۟ لَهُمْ شَهَٰدَةً أَبَدًا ۚ وَأُو۟لَٰٓئِكَ هُمُ ٱلْفَٰسِقُونَ

The Qur'an makes no reference to stoning for *zinā*, which originates in the hadith with respect only to married adulterers. Case records also indicate that the Prophet implemented stoning for *zinā* in a few instances during the ten years of his rule in Medina. The majority of Sunni and Shii scholars maintain that the available hadiths on stoning specify the general of the Qur'an: the 100 lashes are thus applied generally, which has then been specified with regard to married persons.[34] Qur'an commentators understand the phrase "let not compassion move you in their case" to mean that the punishment in their case should neither be postponed nor reduced in severity on grounds of compassion. This interpretation is attributed to three Successors (*tābiʿīn*), namely Mujāhid, ʿIkrimah, and Saʿīd b. Jubayr. According to another interpretation, since the verse makes no reference to married or unmarried persons as such, the 100 lashes therein apply to all without any distinction.[35]

For the majority (*jumhūr*), it matters little if a person has separated or divorced and had no access to his/her spouse for a long time—he/she is still a *muḥṣan*.[36] Muḥammad ʿAbdūh and his disciple Muḥammad Rashīd Riḍā have held, however, that the punishment of *zinā* is only applicable to offenders who were parties to a valid marriage at the time of committing the offence. As for the offender who has been married once but is no longer so, he or she should be punished lightly or equally to that of the unmarried offender.[37]

Abū Zahrah has similarly observed that there is no clear text to determine that a woman who has been divorced, or a man whose wife has died, should be classified as *muḥṣan*. He also refers to the views of ʿAbdūh and Riḍā and then concurs with them that "a *muḥṣan* is a person who is protected (physically and morally), in the case of a woman, by her husband, and when there is a separation, or divorce, she no longer qualifies as a *muḥṣanah* in the same way as she is no longer a *mutazawwijah,* or a married woman." Somewhat like the *musāfir* (traveller) who is no longer a *musāfir* after returning from his journey; or indeed like a sick person (*marīḍ*) who enjoys certain concessions under the law, but not if he has already recovered and no longer an ill person (*marīḍ*), so is the case with the *muḥṣan* who is no longer a *muḥṣan* after the termination of his marriage. There is even a view that the word *muḥṣanat* in the Qur'an means "virgin women" and not, as is commonly said, "married women." This is because virginity is a great disincentive and preventer from *zinā,* just as it also means that a woman who has kept her virginity has not been intimately involved with men. How is it then justified to subject a woman who might have lost two great protections against *zinā,* namely virginity and marriage, to heavier punishment? Is it because her previous marriage is still regarded to be her protector, and if so, where is the logic in this? Reason would surely tell us that a woman who was once married but is married no longer should not be treated more harshly than a virgin, to say the least. If anything, the former should be given a lighter punishment, not harsher, or preferably perhaps the two are treated equally and there is nothing in the Qur'an and Sunnah to say otherwise.[38]

The offspring of *zinā* is alien to the biological father and has no legal tie of paternity with him, nor do the rules of inheritance flow between them. The biological father has no power of guardianship (*wilāyah*) over the offspring, be it male or female. It is also not permissible for one to be in close proximity with one's illegitimate daughter nor to marry her or her ascendants and descendants. It is permissible for the parties to *zinā*

though to marry one another based on a new contract. Thus it is reported that during the time of the first caliph Abū Bakr, a man and a woman were convicted of *zinā* and were punished with 100 lashes and also banished for a year. Then they married one another, and cases of a similar kind are also reported during the time of the second caliph ʿUmar.[39]

Issues over Stoning, Banishment, Doubtful hadiths, and Abrogation

The main question over the punishment of *zinā* is concerned with the validity or otherwise of stoning (*rajm*) side by side with the standard Qur'anic punishment of flogging. Questions have also arisen over the combination of different punishments, namely of stoning, flogging, and banishment. The majority (*jumhūr*) have held that the punishment of *zinā* in the case of a married Muslim is death by stoning as laid down in the hadith, and it is 100 lashes for an unmarried person. The variant opinion on this subject, as elaborated below, maintains that the Qur'anic punishment of 100 lashes applies to everyone, married and unmarried alike.

The first view maintains that the Prophet applied stoning in the widely reported cases of Māʿiz b. Mālik al-Aslamī and that of al-Ghamidiyyah and a person (not named) as reported by the Companion Abū Hurayrah. Then it is added that the Pious Caliphs have also applied stoning, and their precedent is generally seen as conclusive evidence on the continued validity of this punishment.

Māʿiz belonged to the Aslam tribe and was an orphan. He was brought up by Hizal b. Naim, and it was in Hizal's house that Māʿiz committed adultery with a freed slave girl. Upon learning this, Hizal, who did not know about the punishment of stoning, as the report says, sent Māʿiz to the Prophet. He instructed Māʿiz to admit to his guilt before the Prophet and requested that he pray for the atonement of his sin. Māʿiz came to the Prophet and said: "Purify me for I have committed adultery." The Prophet turned his face away from Māʿiz and told him to go away and repent. Māʿiz repeated what he had said twice, but the Prophet avoided answering him on both occasions. Abū Bakr, who was also present, reminded Māʿiz that if he repeated it for the fourth time, the Prophet would have to order him stoned. But Māʿiz repeated the same for the fourth time. The Prophet then inquired about minute factual details. He inquired whether he was drunk, which he denied. Then the Prophet inquired from the people of his tribe over the sanity of Māʿiz. The Prophet then addressed Hizal with

this remark: "I wish you had pulled a curtain over it." Then he ordered the stoning punishment for Māʿiz.[40]

The variant view that questions the validity of stoning is based on the analysis that the Qur'an is totally silent on stoning. Had God Most High intended to validate stoning as a punishment, the Qur'an would have made a reference to it. The proponents of this view have questioned the evidence in the Sunnah by saying that the reported instances of stoning actually took place prior to the revelation of sura al-Nūr (24:2) which prescribed 100 lashes. If this is accepted, it would mean that the Qur'an had overruled and abrogated stoning (*rajm*). It is further argued that the evidence in the Sunnah is all in the form of solitary (*aḥad*) hadiths, and the fact that there is inconsistency in the contents of these hadith reports only aggravates the situation further.

It is further stated that some of the hadiths reported on al-Ghamidiyyah's case contain a reference to banishment (*taghrīb*) as a supplementary punishment to stoning but that this element is absent in other hadiths concerning the same case. There is a similar discrepancy in hadiths on the question of combining stoning with flogging and banishment. In some reports flogging is held to be supplementary to stoning whereas other hadith reports mention stoning as the only punishment without any reference to flogging. The Mālikī and Shii schools have also upheld banishment for a year as a supplementary punishment but they apply it only to men, as banishment for women could expose them to corruption. The other schools require that women be accompanied by a male relative (*maḥram*).

In a chapter titled "Stoning for *Zinā* by a *Muḥṣan,* and Flogging for a *Non-Muḥṣan,*" al-Shawkānī has recorded six hadiths in *Nayl al-Awṭār* in which the following is observed:[41]

1. In the hadith of al-ʿAsīf (lit., employee or servant), an unmarried young man committed *zinā* with a married woman who had employed him. The hadith provides further details to the effect that the Prophet sentenced al-ʿAsīf to 100 lashes and banishment of one year, and the woman was convicted of stoning only. The case has been reported in all the Six Collections of hadith. The substance of this hadith, in so far as it concerns the woman, has also been confirmed by the hadith of Māʿiz and the conclusion is drawn that the Prophet did not combine lashing and stoning together.

2. According to a hadith al-Bukhārī has recorded on the authority of Abū Hurayrah, the Prophet determined the punishment of *zinā* by an unmarried person at 100 lashes and banishment for one year.

   وعن أبي هريرة (رضى) أن النبي (ص) قضى في من زنا ولم يحصن بنفي عام وإقامة الحد عليه.

3. The hadith of ʿUbadah b. al-Ṣamit in which the Prophet declared: "Take it from me, take it from me: Allah has opened a way for them. The unmarried and virgin are liable to 100 lashes and banishment for a year. For a married person the punishment is 100 lashes and stoning."

   خذوا عني خذوا عني قد جعل الله لهن سبيلا : البكر جلد مائة ونفي سنة , والثيب بالثيب ,جلد مائة والرجم.

Except for al-Bukhārī and al-Nasāʾī, this hadith has been recorded in the rest of the Six hadith collections. Al-Zaylāʿī has recorded the information that this is probably one of the earliest hadiths on the subject.[42] This hadith is apparently in conflict with the hadith of al-ʿAsīf and also the hadith of Māʿiz in which the punishment of a married person was confined to stoning only without flogging. Al-Sarakhsī has stated the Ḥanafī position, which is also that of the majority, that stoning and flogging may not be combined because flogging a person who is sentenced to stoning seems superfluous and does not serve any good purpose.[43] The leading schools of law have maintained that the Prophet has never combined the two punishments of stoning and flogging together.[44] But unlike the majority who combine flogging with banishment, the Ḥanafīs do not accept this combination either.

4. The hadith of Jābir b. Samurah to the effect that "the Prophet ordered that Māʿiz b. Mālik be stoned to death but did not mention flogging."

   Al-Shawkānī wrote concerning this hadith: notwithstanding the fact that only Imam Ibn Ḥanbal and al-Nasāʾī have reported it, "its transmitters are reliable."

5. There is a report from al-Shaʿbī recorded by al-Bukhārī and Aḥmad b. Ḥanbal, to the effect that the fourth caliph ʿAlī b. Abū Ṭalib applied the prescribed punishment of *zinā* on a married woman by the name of Sharāḥah al-Hamadāniyyah and it consisted of both stoning and flogging. She was flogged on a Thursday and stoned on the following Friday, and the caliph is reported to have said, "I flogged her in accordance with the Book of God and stoned her in accordance with the Sunnah of the Prophet." This is once again inconsistent with the hadith

of both al-ʿAsīf and Māʾiz in which flogging was not applied in combination with stoning. A further inconsistency here is that al-Bukhārī (Kitab al-Muḥāribīn, Bāb Rajm al-Muḥṣan) has recorded only a shorter version of this hadith in which there is no mention of flogging. Caliph ʿAlī, according to this version, only said, "I stoned her in accordance with the Sunnah of the Prophet."[45]

6. The hadith of Jābir b. ʿAbd Allāh reported by Abū Dāwūd that "a man committed *zinā* with a woman and the Prophet applied the prescribed punishment to him. Then he was informed that the man was a *muḥṣan,* upon receiving this information the Prophet sentenced him to stoning and he was stoned."

Al-Shawkānī has also recorded the hadith of Sahl b. Saʿd to the effect that a man from the tribe of Bakar who was unmarried confessed to have committed *zinā* and the Prophet flogged him but did not issue any order about banishment.[46]

The Ḥanafī jurist al-Zaylāʿī wrote that the hadith of ʿUbādah b. al-Ṣāmit (no. 3 above) has been abrogated and explains this by saying that initially the punishment for *zinā* was unspecified but could be any painful act (*īdhāʾ*), followed by incarceration as prescribed in the two verses in sura al-Nisāʾ *"fa-ādhūhuma*—punish/annoy them both*"* and *"famsikūhunnna fīʾl buyūt*—detain the women in their houses" respectively (al-Nisāʾ, 4:15–16). These portions of the Qur'an were subsequently abrogated by the hadith of ʿUbadah b. al-Ṣāmit, which fixed the punishment of an unmarried person at 100 lashes and banishment for one year, and that of the married person at flogging and stoning. But all this happened, al-Zaylāʿī adds, before the revelation of the sura al-Nūr and that this has been indicated in the hadith of ʿUbadah b. al-Ṣāmit, which began with the words *khudhū ʿanni* (take it from me). Had the Prophet uttered this hadith after the sura al-Nūr, he would most likely have said *khudhū ʿan Allāh* (take it from God). The hadith of ʿUbādah was thus abrogated by the verse revealed in the sura al-Nūr, and flogging 100 lashes became the only punishment for all cases of *zinā*. But then al-Zaylāʿī further adds that this verse was also partially abrogated, that is, in regards to a married person, by the application of stoning to Māʿiz and al-Ghamidiyyah.[47]

There is further information, however, which casts doubt as to the timing of Māʿiz and al-Ghamidiyyah. The relevant report recorded by al-Bukhārī has it that a Companion, Ibn Abī Awfa, was asked this question

by one al-Shaybānī who was a Follower (*tābiʿi):* "Did the Prophet apply the punishment of stoning?" Abī Awfa said, "Yes." He was then asked whether this was before the revelation of sura al-Nūr or after? And he said, "I do not know" (see text of hadith below). This raises doubt as to whether the hadiths, which validated stoning, and actual cases in which stoning was implemented had all preceded the revelation of the sura al-Nūr and that they were consequently abrogated by it. Prior to this event, the Prophet might have simply applied stoning by reference to the ruling of the Torah.[48]

Even al-Zaylāʿī, who considered the hadith of al-Ghamidiyyah to have partially abrogated the Qur'anic verse in sura al-Nūr, recorded two variant versions of that hadith, one of which is explicit to the effect that the Prophet postponed the stoning of al-Ghamidiyyah until the weaning of her child, and the other that omits this part and suggests that she was stoned to death as soon as a man from the Anṣār undertook the custody of her child. To this al-Zaylāʿī commented, "It is possible that there were two women from the tribe of Ghāmid, one whose punishment of stoning was delayed until the weaning of her child and the other who was stoned without such a delay. It is also possible that one of them was from the tribe of Ghāmid and the other from another tribe but that the narrator made a mistake in reporting, and God Knows Best."[49]

We have also seen, in the various reports before us, references to abrogation (*naskh*), itself an issue that raises methodological questions and warrants a brief discussion as follows:

A basic question arises as to whether abrogation is of any relevance to the issue before us. In answer it may be noted that only the Ḥanafīs consider it relevant but not the majority. The majority, including Imam al-Shāfiʿī, have viewed the provisions of the Qur'an and Sunnah on the punishment of *zinā* within the context of specification of the general (*takhṣīṣ al-ʿām*), saying that the general provision of the Qur'an has in this instance been specified by the Sunnah. The Qur'an laid down a certain punishment and the Sunnah adjusted it with respect to married persons. The Ḥanafis have, however, seen this as a case not of specification but of partial abrogation of the Qur'an by the Sunnah, based on the analysis that death by stoning is a capital punishment on which the Qur'an is silent, and if the Sunnah validates it over and above the Qur'anic provision on flogging, then the issue involved here is one of abrogation rather than a mere specification. This seems a sound argument as flogging cannot be specified by death, as the latter far exceeds the former and also exceeds the logical

boundaries of "specification." Another question is whether the Sunnah can actually abrogate the Qur'an.

Although the majority admits in principle the validity of abrogation of the Qur'an by the Sunnah, many prominent scholars, including Imam al-Shāfiʿī, held otherwise to say that it was the proper role of the Sunnah to explain and supplement the Qur'an but not to abrogate it. This is again a sound statement of principle, which Imam al-Shāfiʿī has explicitly adopted in his exposition of the theory of abrogation.[50] This would naturally imply that abrogation should not be too readily brought in and it must be seen as the last resort. The fiqh scholars have consequently shown reluctance to invoke abrogation in order to resolve the discrepancy between the Qur'an and Sunnah on the punishment of *zinā*.

The Ḥanafīs have further added that all the hadiths on the subject of stoning are solitary (*aḥad*) reports that are not totally devoid of doubt, and it would be incorrect to validate death by stoning on the basis of doubtful evidence. The Qur'anic text on the punishment of flogging for *zinā* is perspicuous (*muḥkam*), definitive, and conclusive, which leaves no room for speculative interpretation, whereas the hadiths of Mā'iz and al-Ghamidiyyah are both *aḥad*. Imam Abū Ḥanīfah has considered the hadith of al-Ghamidiyyah to be doubtful and should not be given credibility vis-a-vis the definitive text of the Qur'an.[51] Imam al-Shāfiʿī's understanding of abrogation is distinguished from that of the majority in that only the Qur'an can abrogate the Qur'an and that the Sunnah cannot be the abrogator of the Qur'an. Since the Qur'an is the first source of shariah, it is superior in respect of both authority and authenticity to the Sunnah. Hence any incidence of conflict between the definitive of the Qur'an and the *aḥad* hadith should naturally be determined in favour of the Qur'an. But al-Shāfiʿī, along with the majority, maintains that the general of the Qur'an has been specified by the Sunnah in respect of a married person.

There is also the report, attributed to the second caliph ʿUmar, stating that the Qur'anic text on flogging for *zinā* was abrogated by the Qur'an itself. It is thus stated that a verse was revealed as a part of the sura al-Aḥzāb (i.e., sura 33), which declared that "when a married man or woman commits adultery, stone them to death as a deterrence from God, and God is Most Powerful, Most Wise."

الشيخ والشيخة إذأ زنيا فارجموهما البتة نكالا من الله والله عزيز حكيم.

It is stated that although the wording of this report did not become a part of the Qur'anic text, its ruling has become a part of shariah. It is then stated that the reported addition was not incorporated into the standard text simply because it did not amount to continuously proven, or *mutawātir*, and anything less than *mutawātir* cannot, as a rule, become a part of the Qur'an. ʿUmar b. al-Khaṭṭāb has widely been quoted as having said, "Had it not been for people saying that ʿUmar made an addition to the Qur'an, I would have added this to the Qur'an." The renowned Qur'an commentator, Shihāb al-Dīn al-Alūsī (d. 1854), has related this in his *Rūḥ al-Maʿanī*. The conclusion he has reached is that the evidence in support of this episode is doubtful, adding that the prominent Ḥanafī jurist, Kamal al-Din Ibn al-Humam (d. 861/1457), has arrived at the same conclusion. Both scholars have also held that the actual wording of the alleged verse falls short of the eloquent style of the Qur'an and then said that there was an addition on stoning but that God Most High ordered the Prophet to eliminate it from the text while retaining its ruling, which all sounds rather imaginary. This is also the position taken by the Kharijites and the Muʿtazīlah. Had God, May He be Glorified, willed to prescribe stoning for *zinā,* He would have made a clear provision in the Qur'an for it. The conclusion is thus drawn that ʿUmar's report of the added verse remains doubtful and cannot be taken to overrule the clear text on flogging.

The claim that the Companions have reached a consensus on ʿUmar b. al-Khaṭṭāb's version of events has also been questioned by both Ibn al-Humam and al- Alūsī when they stated that it was debatable whether a tacit consensus (*al-ijmāʿ al-sukūtī*) of this kind could present credible evidence in the face of the clear text of the Qur'an. The fact is that by the time of caliph ʿUmar most of the leading Companions had either lost their lives (e.g., in the wars of apostasy) or they were away from Medina, and this weakens the claim of general consensus (*ijmāʿ*) in support of ʿUmar's version of events, on which there is only ʿUmar's report, but other Companions have remained silent concerning it.[52]

Further on banishment as a supplementary punishment, the Ḥanafīs and the Shia have held that the punishment of an unmarried person is only 100 lashes. If the head of state decides to banish the fornicator, he may do so by way of shariah-oriented policy (*siyāsah sharʿiyyah*), but they maintain that this is not a requirement. Imam al-Shāfiʿī maintained on the other hand that banishment for one year is a requirement and an integral part of the prescribed punishment for an unmarried person, whether male or female. They are to be flogged 100 lashes and banished from their place

of residence to another place, which takes a journey of at least twenty-four hours. This is also the position of the Ḥanbalīs and the Ẓāhiriyyah. But Imam Mālik (d. 179/795) and al-Awzāʿī (d. 157/774) have exempted women from the general ruling of the hadith on banishment based on considerations of public interest (*maṣlaḥah*), which is meant to prevent further indulgence in corruption. It is also stated that the requirement that a woman may only be banished with the company of a close relative means that an innocent person is also condemned to banishment with her. The Ḥanafīs have also added that the Pious Caliphs, including ʿUmar b. al-Khaṭṭāb, are on record to have punished *zinā* by unmarried persons with flogging only without banishment.[53]

Modern Opinion on Stoning (Rajm)

This section examines the views of Muḥammad Abū Zahrah, Muṣṭafā Aḥmad al-Zarqā, Yūsuf al-Qaraḍāwī, Sheikh Ali Gomma, and others on death by stoning as a punishment for adultery.

As already noted, the majority of the leading schools of Islamic law have upheld the validity of stoning for adultery, except for some of the Muʿtazīlah and the Kharijites, who maintain that stoning was the punishment at an early stage but was abrogated with the revelation of the Qur'anic verse (al-Nūr, 24:2) that declared 100 lashes for both men and women adulterers.[54] As already noted, there are differences of opinion as to how the ruling of the Sunnah on stoning relates to the Qur'an: Is it a case of specification (*takhṣīṣ*) or of abrogation (*naskh*)? Then there is the ruling of the second caliph ʿUmar, also mentioned before, that it is not a case of the Sunnah abrogating the Qur'an but one of abrogation of the Qur'an by the Qur'an itself. This is a kind of hidden abrogation, which means that the abrogating text is not in the Qur'an, yet the Qur'an has retained the actual ruling thereof. Current practice in many Muslim countries is dominated by the ruling of the Sunnah on stoning for married adulterers. Twentieth-century scholars have reflected further on this and offered additional clarifications and insights as discussed below.

ʿAlī Manṣūr, author of *Niẓām al-Tajrīm wa'l-ʿIqāb fī'l-Islām* (1976), former president of the Constitutional Court of Egypt and chairman of the Committee on the Harmonisation of Shariah and Law, wrote that "Muḥammad Abū Zahrah, who is one of the leading scholars of shariah of this century, sent to me in writing his opinion on the subject of stoning where he concluded that the evidence for this punishment was

doubtful and it was therefore preferable not to apply it."[55] Manṣūr added that Abū Zahrah expressed his views at a conference in the Moroccan city of Casablanca on 22nd Rabī'al-Awwal 1392H, which corresponds to 6 May 1972. Abū Zahrah's views on this have also to a large extent appeared in his own book, *al-Jarīmah wa' l-ʿUqūbah fī 'l- Fiqh al-Islāmī: al-ʿUqūbah,* published in several editions (initially published ca. 1959), which may be summarised as follows:

1. There is no disagreement among the jurists and ulama of the four leading schools of Islamic law that the punishment of flogging for *zinā,* prescribed in the Qur'an, applies to unmarried men and women. The majority (*jumhūr*) have added that a male fornicator is also liable to banishment, that is, removal from society or imprisonment, for a year so that he is not ostracised for what he has done and that in course of time the people may forget about it. Imam Mālik has held that banishment should not apply to women convicted of *zinā* for fear of immorality and corruption.[56]
2. As for the punishment of stoning for a married person, Abū Zahrah refers to the relevant hadiths especially the hadith of al-ʿAsīf, the report from ʿUmar b. al-Khaṭṭāb concerning the verse according to him of stoning, and then the stoning of Māʿiz and al-Ghamidiyyah. But then he notes that all of these hadiths are solitary or *aḥad* and the mere fact that there are several of them does not elevate them to the rank of continuously proven or *mutawātir.* Only the *mutawātir* inspires conviction and precludes the possibility of lying and doubt in the transmission of hadith.
3. Abū Zahrah draws attention to the hadith recorded in *Ṣaḥīḥ al-Bukhārī* that one of the Followers (*tābiʿūn*) asked a leading scholar (*mujtahid*) among the Companions whether the sura al-Nūr, which prescribed the punishment of flogging, was revealed before the hadiths on stoning or thereafter. The Companion answered that he did not know. The person who asked the question was al-Shaybānī and the Companion was ʿAbd Allāh Ibn Abī Awfa. The text of this hadith is as follows:

> Narrated from Iṣḥāq—from Khālid—from al-Shaybānī: I asked ʿAbd Allāh Ibn Abī Awfa. Did God's Messenger carry out the stoning punishment? He said yes. I then asked: Before the revelation of sura al-Nūr or after it? He replied "I do not know."[57]
>
> حدثني اسحاق كما حدثني خالد عن الشيباني قال : سألت عبد الله ابن أوفى : هل رجم رسول الله (ص) ؟ قال نعم قلت قبل سورة النور أم بعدها؟ قال : لا أدري .

Hadith scholars have, however, attempted to resolve the doubt raised in this report by saying that the hadiths of stoning came after the revelation of sura al-Nūr and therefore abrogated the latter, which is why ʿUmar b. al-Khaṭṭāb acted on the rulings of these hadiths. The sura al-Nūr was revealed in the year four Hijrah and, according to some reports, five or six Hijrah, and that the transmitters of the hadiths on stoning included persons like Abū Hurayrah and Ibn ʿAbbās who came to Medina in the years seven and nine respectively. But then it is said that they might have reported the hadiths from other Companions without actually saying so—hence the question still remains unanswered as to the timing of the hadith reports. The issue is then addressed on methodological grounds, as the majority maintains that the general (*ʿām*) does not abrogate the specific (*khāṣṣ*) but is itself specified by it even if the specific is later in time. The general terms of the verse of *zinā* in sura al-Nūr have thus been specified by the hadith. But the Ḥanafīs, as already noted, do not allow this by means only of *aḥad* hadith, saying that the hadith in question must be either continuously proven or widely known, *mutawātir* or *mashhūr,* and the hadiths on stoning do not qualify as either.

Furthermore, the Ḥanafīs do not follow the hadith of al-ʿAsīf despite the fact that it has been recorded by four of the Six Compilations of hadiths, because the provision of banishment therein is an addition to the Qur'an, and this cannot be done by means only of an *aḥad* hadith. The Qur'an has made no reference to banishment and that must prevail over the doubtful addition of the *aḥad* hadith. Although the Ḥanafīs do not consider banishment to be obligatory, they still maintain that the head of state is within his rights to combine it with flogging if he deems this would serve a good purpose. Banishment, in other words, is not a part of the *ḥadd* punishment but may be added to it by way of *taʿzīr.* This is also the view of the Imami and Zaydī Shia. The Imams Mālik, al-Shāfiʿī, Ibn Ḥanbal, and the Ẓāhirī school have, on the other hand, held that banishment is an integral part of the prescribed punishment, and this they have ruled on the authority of the hadith of al-ʿAsīf.[58]

4. At this point Abū Zahrah relates the views of the Kharijites, some Shia, and Muʿtazīlah to the effect that there is no other punishment for *zinā* other than flogging. Had God Most High intended to validate stoning, the Qur'an would have been explicit on it. They have further argued

> that stoning is the most severe of all punishments, it should therefore be proven by decisive evidence of either the Qur'an or hadith *mutawātir,* and all the available hadiths on stoning fall short of *mutawātir.* Although the solitary or *aḥad* hadith can create obligation and a shariah ruling, it cannot override what is proven by decisive evidence. Added to this is the unresolved doubt expressed by a Companion as to whether the stoning of Māʿiz and al-Ghamidiyyah preceded or succeeded the Qur'anic text. Stoning as a punishment thus collapses on the basis of the rule that doubt suspends the implementation of *ḥudūd.*

ʿAlī Manṣūr then observes that "based on these reasons and the attending doubts concerning the proof of stoning and its severity, the learned author (Abū Zahrah) was not inclined to recommend its enforcement."[59] This is also intimated in Abū Zahrah's own writing (some fifteen years previously), which stopped short, however, of making a categorical statement (i.e., on whether enforcement should be suspended).[60] Abū Zahrah's own analysis, however, contains additional information to the effect that stoning was initially introduced in the Torah, which was applied by the Jews and the Bible did not overrule it, and since the Old Testament was also proof that the Christians too applied it. There is in fact clear confirmation in the Qur'an that the Jews of Medina were governed by their own scripture:

> And how do they make you a judge and they have the Torah wherein is God's judgement! Yet they turn away after that! And these are not [true] believers."[61]

وَكَيۡفَ يُحَكِّمُونَكَ وَعِندَهُمُ ٱلتَّوۡرَىٰةُ فِيهَا حُكۡمُ ٱللَّهِ ثُمَّ يَتَوَلَّوۡنَ مِنۢ بَعۡدِ ذَٰلِكَۚ وَمَآ أُوْلَٰٓئِكَ بِٱلۡمُؤۡمِنِينَ

Qur'an commentators have stated the occasion of the revelation of this verse as follows: One of the leading Jewish figures who was residing in Medina had committed *zinā*, and the Jewish community was distressed with the predicament of their leader being stoned in accordance with the Torah. So they came to the Prophet in the hope of securing a lighter punishment for the accused. The Prophet mentioned the ruling of Torah to them. So the story goes, but perhaps we need not go into the details of it here. Abū Zahrah has said concerning this case that it happened at a time when the Jews lived peacefully in Medina under the Prophet's leadership but that relations turned hostile soon thereafter.[62]

Mohammad Suleman Siddiqi's research leads him to the conclusion that the verse above was revealed to the Prophet as late as in the year 7th Hijrah, whereas al-Nisāʾ (sura 4) was revealed in 3rd Hijrah and al-Nūr (sura 24) in the year 5th Hijrah, all of which deal with the punishment of unmarried offenders. With reference to married offenders, the Prophet referred to the rulings of previous revelations, especially the Torah, which provided stoning for married offenders. Siddiqi also mentions that the case of adultery committed by a man and woman from the Jewish tribe of Khaybar occurred in the 1st year Hijrah immediately after the Prophet's migration to Medina.[63]

It was probably during the closing months of the 5th year Hijrah and the beginning of the 6th Hijrah that the verse in sura al-Nūr (24:2–3) was revealed. The events between the 1st year Hijrah until the revelation of this verse leave little doubt that the Prophet had implemented the punishment of stoning by reference to Torah.[64]

ʿAlī Manṣūr, who quoted Abū Zahrah's view on this issue, adds that another prominent jurist, Muṣṭafā Aḥmad al-Zarqā, was present at the same conference and heard Abū Zahrah's views on the subject of stoning: "He too sent his opinion in writing to me in my capacity as Chairman of the then United Arab Republic's Committee for Harmonisation of Shariah and Law, wherein he had reached the conclusion that stoning as a punishment for *zinā* should not be enforced, not because of the doubt in the authenticity of hadith but because it is quite possible that the Prophet imposed stoning as a *taʿzīr* punishment." Al-Zarqā then added that this was also the opinion of Shaykh Maḥmūd Shaltūt. The text of al-Zarqā's letter contained the following:

> In my view there is a distinct possibility that the Prophet ordered stoning, in the related incidents by way, not of *ḥadd,* but of *taʿzīr* punishment. For he saw under the circumstances that only a strong and decisive stand on this issue could curb the rampant immorality and corruption of the Time of Ignorance (*jāhiliyyah*). Since the lawful government and the *ūli al-amr* are within their rights to introduce *taʿzīr* punishment in their effort to combat criminality and to secure benefit for the community, it is likely that the Prophet also exercised his authority in this way and introduced stoning as a *taʿzīr* punishment.[65]

Al-Zarqā refers to the current climate of modern opinion among the ulama to the effect that stoning "is a *taʿzīr* punishment, not one of the *ḥudūd*, and

it is as such, a matter for the head of state to apply it in aggravated circumstances. This view also finds support in the Sunnah of the Prophet and the manner he actually applied stoning as a punishment for *zinā*."[66] Al-Zarqā continues that the textually prescribed and standard punishment for *zinā* is 100 lashes of the whip. He adds further that the shariah has made the application of *ḥudūd*, including that of *zinā*, contingent on strict conditions that must be observed in the material aspects of the offence, its evidence and proof. If all these conditions are properly observed, *ḥudūd* can only be expected to be rarely applied as they will, for the most part, be converted to *taʿzīr* penalties that the *qāḍī* determines by reference to the attending conditions of the crime. The presence of any doubt, even a slight one, will suspend the *ḥadd* in question. For this is the clear directive of the hadith: "Suspend the *ḥudūd* whenever there is doubt."[67]

With reference to the proof of *zinā*, al-Zarqā is of the view that "it is impossible to prove *zinā* except by the confession of its perpetrator," simply because proof by witnesses would require eye witnessing by four upright persons, which is almost impossible to obtain. Confession by the perpetrator "must also be four times in four different sessions, and when these strict conditions are not met in the proof of *zinā*, the punishment in question, be it lashing or stoning, would be abandoned and recourse had to be made to *taʿzīr* punishment, the type and quantity of which is determined by the ruler in accordance with its attending circumstances."[68] In the event of retraction of a confession, the prescribed punishment is also abandoned and substituted with a *taʿzīr* punishment.

Cheriff Bassiouni also wrote concerning the punishment of *zinā* that the Qur'an provides flogging as the punishment for this offence and not stoning as is often assumed. Death by stoning "was first imposed by the Prophet during his days in Madinah (620–632 CE), when he applied Jewish law to the Jewish tribes in and around Madinah, and whose laws required such a penalty. In other words, Islam itself does not require stoning, and its use was mistakenly transposed onto Islam."[69]

Yūsuf al-Qaraḍāwī has forcefully spoken on another aspect of the *ḥudūd* enforcement, which is that it is a matter for the ruling authorities, not for individual Muslims, to attempt the implementation of *ḥudūd*. Even if they know the perpetrator and are able to enforce the punishment, their role would be to report the matter to the authorities but not to take the law into their own hands. For that would lead to chaos and confusion. It is not for individuals to cut the hand of the thief, lash the adulterer or stone him, lash the wine drinker, retaliate against the murderer, and so forth. Some

people may think that this is expected of them and thus "appoint themselves as police, judge and enforcement officers."[70] This would be patently erroneous. It is not their role, and they should not take it on themselves.

Al-Qaraḍāwī further adds that, in the event where the government and the *ūli al-amr* fall short of enforcing the rules of shariah, or when they breach the trust and order of duty entrusted to them, then it is for the community to advise the leaders by way of constructive advice (*naṣiḥah*). Otherwise the people should resort to all lawful means until they succeed to impress their message on their leaders, but they should also bear in mind the shariah guideline that one should not try to repel an evil with a bigger evil. It is an obligation under such circumstances to take the lesser of the two evils. Hence the role of the individual in regard to law enforcement is to assist honest employees and enforcement officers and work with them to apply the law but not to take their place and become the law enforcers themselves.[71]

In a fatwa issued with regard to the applicability in modern times of Islamic corporal punishments, the former Grand Mufti of Egypt, Sheikh Ali Gomaa, stated the following:

> *Ḥudūd* have not been implemented in countries such as Egypt for a very long time. This is because the legal conditions for their implementation, which describe specific means for establishing guilt and stipulate the possibility of retracting a confession, are not met . . . Most of the penal codes of the remainder of the Islamic countries...remain silent on the issue of corporal punishment (*ḥudūd*). This is because our age is one of general uncertainty (*shubha*), and the Prophet, may the peace and blessings of God be upon him said, "Stay the enforcement of corporal punishments when there is doubt."[72]

*Homosexuality, Incest, and Lesbianism (*Liwāṭ, Zinā bi'l-maḥārim, Siḥāq*)*

Homosexuality and adultery have an aspect in common, which is that both involve prohibited sexual intercourse, except that the former consists of penetration of the male organ into the anus of a man or woman, whereas *zinā* consists of penetration of the male organ into a woman's vagina.[73] *Zinā* according to the majority thus requires actual penetration by the man

into the vagina of a woman, whereas the Ḥanbalī and the Shii schools also include anal intercourse in the definition of *zinā*. For the Shia, in addition, sexual acts without penetration, as well as homosexuality and pimping, are regarded as *ḥudūd* offences, whereas the Sunni schools regard such acts not as *ḥudūd* crimes can nonetheless be punished by the judge under *taʿzīr* deterrent punishment.[74] For homosexuality to be punishable under *ḥudūd* in Shii law, the perpetrator must confess four times, or by four witnesses, failing which it is punishable only under *taʿzīr*, regardless as to whether the person is in the active or passive position. There is also a choice, under Shii law, for the authorities to kill the perpetrator by the sword, stoning, throwing from a great height, or burning. Homosexuality and lesbianism even without actual penetration are punishable with 100 lashes of the whip.[75]

Muslim jurists quote the following Qur'anic passages, addressed to the people of Lot, on the prohibition of homosexuality:

> You practice your lusts on men in preference to women: you are indeed a people transgressing beyond bounds. (al-Aʿrāf, 7:81)
>
> إِنَّكُمْ لَتَأْتُونَ ٱلرِّجَالَ شَهْوَةً مِّن دُونِ ٱلنِّسَآءِ ۚ بَلْ أَنتُمْ قَوْمٌ مُّسْرِفُونَ

> Of all the creatures in the world, will you approach males, and leave those whom God has created for you to be your mates! Nay, you are a people transgressing (all limits). (al-Shuʿarāʾ, 26:165–166)
>
> أَتَأْتُونَ ٱلذُّكْرَانَ مِنَ ٱلْعَـٰلَمِينَ. وَتَذَرُونَ مَا خَلَقَ لَكُمْ رَبُّكُم مِّنْ أَزْوَٰجِكُمْ ۚ بَلْ أَنتُمْ قَوْمٌ عَادُونَ

Muslim jurists have also quoted the hadith in which the Prophet is reported to have said: "God has cursed those who practice what the people of Lot did (and the Prophet repeated it three times [لعن الله من عمل عمل قوم لوط]"[76]; and: "Kill the active and passive partners both [اقتلوا الفاعل والمفعول]"; and "Stone the upper and the lower partners both" [ارجموا الأعلى والأسفل].[77] A longer version of this last hadith has additional information from the Companion Ibn ʿAbbās, who was asked whether the notion of virginity was relevant in homosexuality; he replied and quoted a longer version: "Kill the active and the passive partners, be they married or unmarried."[78]

اقتلوا الفاعل والمفعول به احصن او لم يحصن .

Whereas the majority apply the rules of *zinā* also to homosexuality, Imam Abū Ḥanīfah has differed over the analogy of *liwāṭ* with *zinā* and the

analogical application also of the prescribed punishment of *zinā* to that of *liwāṭ*. Yet the two disciples of Abū Ḥanīfah, Abū Yūsuf and al-Shaybānī, have sided with the majority and held that *liwāṭ* is like *zinā* and subject to the same punishment. Homosexuality is thus punished with 100 lashes if committed by an unmarried person and punished with stoning if the perpetrator is married.[79] But if the validity of stoning as a valid punishment collapses in the case of adultery, that position will also apply to homosexuality.

There is a difference of opinion, however, about the punishment of *liwāṭ*. The Mālikīs, some Shāfiʿīs, Ḥanbalīs, and the Shia are of the opinion that this punishment should be death by stoning (Mālikīs), the sword (some Shāfiʿīs and Ḥanbalīs), throwing from a high wall or burning, or death by the sword or at the discretion of the court (Shia). Some scholars of the Shāfiʿī and Ḥanbalī schools maintain that the concept of a married person (*muḥṣan*) only applies to the active partner and is not relevant to the passive partner. This also means that only the former, if a married person, can be stoned to death (assuming the validity stoning) and that the punishment for the latter is always flogging.[80]

As for the proof of homosexuality, it is like that of adultery: four male eyewitnesses who have observed the actual penetration with the same specifications as are required in the proof of *zinā*. This is the position of the Mālikī, Shāfiʿī, Ḥanbalī, and Shii schools. The Shii school also maintains that homosexuality (*liwāṭ*) is similarly proven by a confession that is repeated four times. The death penalty for the active partner is maintained even if the passive party is a child or insane, in which case the child may be subjected to a disciplinary sanction. If a non-Muslim (i.e., a *dhimmī*) commits the act with a Muslim, the *dhimmī* is to be killed, but if both parties are *dhimmī*, the ruler/imam may decide on the manner and quantum of punishment.[81]

The Ḥanafī school maintains that homosexuality is proven by the testimony of two male witnesses since there is no clear text in the Qur'an or hadith to equate it with adultery and also that the harm of *liwāṭ* is less than that of *zinā* as it does not involve interference in the family line of descent. *Liwāṭ* is also not punished as a *ḥudūd* crime but as a *taʿzīr* offence, and the quantum of punishment is determined by the ruler and judge. If there is repetition and the offender is not deterred by that punishment, he is to be executed by the sword, again by way of *taʿzīr*, but not as a *ḥudūd* offence.

The renowned Zaydī Shii scholar from Yemen, Muḥammad b. ʿAlī al-Shawkānī, has criticised Abū Ḥanīfah's comment in saying that there is no clear text on the subject of *liwāṭ*—for there is sufficient evidence in the

hadith to make this a textually prescribed offence.[82] Abū Zahrah, himself a Ḥanafī, takes up the point and effectively concurs with al-Shawkānī's assessment and also adds that there is no need for an analogy between homosexuality and adultery, as the majority has drawn, simply because the death punishment for the former is based on the text (of hadith) and not any analogy. Analogy is in principle not valid in *ḥudūd* and that position still prevails. It is further added that the reason Abū Ḥanīfah took a different view of homosexuality and considered it a *taʿzīr* offence is that he thought the hadiths on the punishment of homosexuality were all solitary and generally weak of authenticity.[83]

As for a man who has anal sex with his wife, there is general agreement that the perpetrator is not liable to the prescribed punishment of *liwāṭ* but that he has committed an act of lewdness that is greatly sinful and liable to punishment in the hereafter. According to a hadith on the authority of Khuzaymah b. Thabit, Abū Hurayrah, and ʿAlī b. Talq, the Prophet has said, "Do not approach your women from their backs *(la-taʾtu al-nisāʾ fī-adbārihinna*)." It is also reported by ʿUmar b. Shuʿayb—from his father/from his grandfather—in a hadith from the Prophet, who said that "it is a minor *liwāṭ* (*hiya al-liwāṭah al-ṣughra*)." According to another hadith, also from Abū Hurayrah, the Prophet has said, "One who approaches his wife from behind, be she in her menstrual cycle or otherwise . . . has given a lie to what has been revealed to Muḥammad."[84]

Musāḥaqah literally means rubbing fiercely without penetration, typically the act of two women rubbing their private parts against one another, which can also occur between two males. As for the juridical basis of *musāḥaqah*, fiqh textbooks refer to the Qur'anic passage that speaks in praise of believing women who "guard their private parts (*li-furūjihim ḥāfiẓun*) except with those who joined to them in the marriage bond." The text continues to declare "those whose desire exceed these limits," to be transgressors (23:5–7). The fiqh scholars also subsume lesbianism under the Qur'anic term *fāḥishah* (al-Aʿrāf, 7:80) and hold that it as impermissible. Hence all sex outside marriage, including *musāḥaqah*, is transgressive of the shariah limits. Also quoted is the hadith that provides: "A woman may not look at the private parts of another woman nor may she sleep under the same cover with her." In yet another hadith, it is declared: "When a woman [sexually] approaches another woman, both of them are adulterers (*zāniyatān*)." [86]

إذا أتت المرأة المرأة ، فهما زانيتان.

No punishment is, however, mentioned for *musāḥaqah*, hence the conclusion that it is a transgression (*maʿṣiyah*) that may be punished under *taʿzīr*. This is also the position under Shii law. The equation of *musāḥaqah* to *zinā* in the second hadith is in its literal sense, as *zinā* in Arabic means transgression and sin. But *zinā* and lesbianism are different in that the latter does not involve penetration nor does it threaten purity of the family lineage.[85]

Incest (*zinā bi'l-maḥārim*) is *zinā* with someone within the prohibited degrees of relationship, whether by blood or marriage, such as one's mother and daughter or one's step-mother, be it by consent or without. All are punishable by death, it is said, by the sword, regardless of whether the perpetrator is married or unmarried, Muslim or non-Muslim. The Qur'an does not specifically mention incest as a separate category nor as a separate offence, hence it is subsumed by its rulings on *zinā*. Much of the information on incest comes from the evidence in hadith. In a hadith narrated by al-Bara b. Azib, he said: "I met my maternal uncle—in some reports it is paternal uncle—and he was carrying a sword. I asked him: where are you going? And he said "The Prophet, pbuh, sent me for a man who married his step-mother—to strike his neck and take away his property."[87]

حديث البراء بن عازب – رضي الله عنه – في قتل من نكح امرأة أبيه ، وقد جاء بعدة ألفاظ منها : لقيت خالي – وفي بعض الروايات : عمي– ومعه راية ، فقلت له ؟ . فقال : بعثني رسول الله – صلى الله عليه وسلم – إلى رجل تزوج امرأة أبيه أن أقتله أو أضرب عنقه

Another hadith refers to the authority of Muawiyah b. Qurrah from his father, to the effect that the Prophet sent his grandfather [Mu'awiyah] for a man who had married the wife of his son to "strike his neck and take away his property." The reason for expropriation was that, by committing incest, the perpetrator had renounced Islam in the meantime, for he committed a sexual act with a woman who he knows is *ḥarām* to him. Hence applying the prescribed punishment in his case is strictly obligatory.[88]

Another Companion, Jābir b. ʿAbd Allāh, has been quoted to have said concerning one guilty of incest that his head should be struck and his assets to be handed over to the public treasury as punishment for himself and deterrence to others. Imam Ibn Ḥanbal has held that killing the perpetrator of incest is obligatory, whether the perpetrator is married (*muḥṣan*) or otherwise, especially one who commits it with his step-mother. In another hadith recorded by Ibn Majah, it is reported on the authority of Ibn

ʿAbbās, who quoted the Prophet, pbuh, as saying, "One who has intercourse with a close relative [prohibited to him] should be killed."[89] For he has violated what God has made *ḥarām*; he is a renegade and renouncer of Islam who may be slain and his property given to the public treasury. This is also the conventional fiqh position with one who renounces Islam and becomes an infidel (*kāfir*). This hadith is inclusive of all instances of incest regardless as to whether they involve marriage with a close relative or intercourse without marriage; all of it is considered as *zinā*. Muslim jurists are in agreement on the enormity of incest in all of its varieties as an act that is beyond sound human nature and that the perpetrator stoops so low as to become an ugly beast who calls upon himself the wrath of God and mandatory enforcement of the death punishment.[90]

In a book entitled *al-Ḍarūrah al-Marḥaliyyah fī Taṭbīq al-Qānūn al-Jināʾī al-Islāmī* (The Necessity of Gradualism in the Implementation of Islamic Criminal Law), Fatḥī al-Khammāsī argues that, following the Islamic revivalist discourse of recent decades, the Muslim world has been witnessing a revival of certain aspects of the shariah. This came as a new phase in the experience of the ummah following aggressive colonial policies to suppress shariah in the sphere especially of public law. What many countries are experiencing is nothing less than a new beginning, fraught with new challenges, especially concerning the hard-core aspects of Islamic criminal law.

With regards to homosexuality (*liwāṭ*), the author proposes a two-phased approach, the first of which should opt for the view of Imam Abū Ḥanīfah that *liwāṭ* should be punishable as a *taʿzīr* offence, as there is, unlike with *zinā*, no mixing of genealogy and family descent in *liwāṭ*. The second phase of implementation should bring in the position of the majority (*jumhūr*), which treats homosexuality as a *ḥudūd* crime and subjects it to the same punishment as that of adultery (*zinā*).[91]

VI

*Theft (*Sariqah*)*

THEFT IS THE subject of a great deal of writings in both traditional and contemporary scholarship. The discussion that follows focuses on a select number of issues, beginning with a review of the Qur'anic verse on theft and then discussing issues pertaining to theft from one's relatives, issues over the quorum (*nisāb*) (i.e., the minimum quantitative value that invokes the prescribed punishment), and issues about safekeeping and ownership (*ḥirz, milkiyyah*), respectively. Other aspects of theft explored in this chapter are the proof of theft, the punishment and consequences of theft, and repentance by the accused. References to contemporary opinion, contributions of leading Muslim scholars, and reform proposals are also featured.

Theft is the subject of the following Qur'anic verse:

> As for the thief, both male and female, cut off his or her hands: a retribution for their deeds and exemplary punishment from God. And God is exalted in power, most wise. But if the thief repents after his crime and amends his conduct, God redeems him, God is forgiving, most merciful. (al-Mā'idah, 5:38–39)

وَٱلسَّارِقُ وَٱلسَّارِقَةُ فَٱقْطَعُوٓاْ أَيْدِيَهُمَا جَزَآءًۢ بِمَا كَسَبَا نَكَـٰلًا مِّنَ ٱللَّهِ ۗ وَٱللَّهُ عَزِيزٌ حَكِيمٌ (٣٨) فَمَن تَابَ مِنۢ بَعْدِ ظُلْمِهِۦ وَأَصْلَحَ فَإِنَّ ٱللَّهَ يَتُوبُ عَلَيْهِ ۗ إِنَّ ٱللَّهَ غَفُورٌ رَّحِيمٌ (٣٩)

Due to the severity of its punishment, Muslim jurists have defined theft narrowly and stipulated a large number of conditions it must fulfill before the prescribed punishments can be implemented. Every act of theft must fulfil the following requirements. First, the act must involve surreptitiously taking away the (movable) property of another with a minimum

value (*nisāb*). The act is not surreptitious if someone steals goods from a market stall in broad daylight, hence the fixed penalty for theft cannot be imposed. The stolen property must not be partially owned by the perpetrator nor entrusted to him; and it is taken by a legally competent person (*ʿaqil, bāligh*) from a place that is locked or under guard (*ḥirz*). Theft thus differs from usurpation (*ghasb*) wherein the property of another person is taken openly, often by force. These elements are also present in banditry or *ḥirābah*, also known as the "great theft" (*al-sariqat al-kubrā*) where life and property are often both attacked through acts of terror openly involving a display of power and subjugation of the victim(s).[1] The leading schools of Islamic law have recorded different opinions on the types of safeguarding and the details, which will not be discussed here beyond saying that all the leading schools, including the Shia Imamiyyah, have held that recourse should be *ḥadd*—in a due understanding of *ḥirz*—to general customs that prevail at time of the theft.[2] This is also the position many contemporary scholars have taken on the subject.

One of the tests of valuability and quorum fulfillment of the stolen good is that, if someone destroys it, he or she is held liable for compensation or replacement. The property taken must also have market value (*māl mutaqawwim*) and fulfils the required quorum (*nisāb*).

Theft from Relatives

Theft from a close relative is not punishable, according to Imam Abū Ḥanīfah, as close relatives often enter each other's quarters. There is an implicit permission, which means that it does not meet the requirement of a guarded place (*ḥirz*). But this is not necessarily so in the case of theft from relatives further removed, such that assuming an implicit permission would seem out of place. However, theft in this case would amount to severing the ties of kinship, which is also prohibited (*ḥarām*) under shariah. The Imams al-Shāfiʿī, Mālik, and Ibn Ḥanbal, as well as the Shia Imamiyyah, maintain that theft is not punishable for a father regarding the property of his son and grandson and that this exemption also applies to a mother and her descendants. Imam Mālik has differed slightly on this to say that the forebears are not punished by the prescribed punishment, but that if the descendants steal from their forebears, they are liable to punishment. Imam Mālik has in this case followed more closely the hadith to the effect that "you and your property belongs to your father"—(انت ومالك لابيك). The Shia also follow the ruling of this hadith.[3] Differences of opinion

have been recorded as to whether spouses are liable to the prescribed punishment for stealing from one another. Whereas the Ẓāhirī school makes them both liable for stealing from one another, Imam Abū Ḥanīfah absolves them both. Imam Mālik and al-Shāfiʿī hold that they are only liable for theft of property they have segregated or locked away from each other's access. An alternative Shāfiʿī view is that the wife is not liable if she steals from her husband, as the latter is responsible for her maintenance, but that the husband is liable if he steals from his wife.[4] The Shia Imamiyyah maintain that neither the husband nor the wife are liable to mutilation if the one steals from the other, and that the same applies also if a person steals from his brother.[5] Theft is generally punishable if committed by one's collateral relatives such as brothers and sisters and their descendants. That said, theft from a relative in all these categories may be subjected to a lighter *taʿzīr* punishment if deemed appropriate by a competent judge.

*Issues over the Quorum (*Nisāb*)*

Differences of opinion have arisen over the quorum, or minimum quantitative value, of stolen goods. According to the jurists of the Hijaz (Mecca and Medina), as well as the Mālikīs, Shāfiʿīs, and Shia Imamiyyah, the value of the stolen goods must be equivalent to at least three silver dirhams or one-quarter of a gold dinar. The jurists of Iraq, including the Ḥanafīs, maintain that the quorum is ten silver dirhams, or one dinar, and that no mutilation is permissible for anything less. This is based on the authority of a hadith narrated by ʿAbd Allāh b. Masʿūd: "Hand is not mutilated except [for the theft of] one dinar or ten dirhams [لا قطع إلا في دينار].[6]

In yet another hadith reported by Abū Hurayrah, it is stated: "God curses a thief whose hand is cut for stealing [merely] of an egg and one who steals a rope."

لعن الله السارق يسرق البيضة تقطع يده ويسرق الحبل فتقطع يده.

There are two other hadith reports on this, one narrated by Imam Mālik from Nafi'– from Ibn ʿUmar that "the [hand of] thief is not mutilated except for the price of *al-mijn* [shield], which was estimated at ten dirhams at the time of the Prophet." Al-Qurṭubī, who quoted this hadith, adds that the jurists of Iraq who have relied on this hadith also record the information attributed to Ibn ʿAbbās, who said that the price of a shield during the

Prophet's time was ten dirhams and that no mutilation should be ordered for anything below this. Al-Qurṭubī, who considers this a good position, also adds that the recommendation would have prevailed had it not been for the hadith of ʿĀ'ishah on which al-Shāfiʿī relied (i.e., that the quorum is a quarter of a dinar).[7]

Notwithstanding the Ḥanafī claim of a general consensus (*ijmāʿ*) in favour of ten dirhams as the minimum quorum, there is considerable variation in the sources over this, which makes the claim of general consensus difficult to sustain. Thus, according to an alternative opinion, mutilation is not required for the theft of anything less than ten dinars or forty dirhams. The fifth Shii Imam, Muḥammad al-Bāqir, has on the other hand given the quorum at five dirhams.

Differences of opinion also obtain in regards to the question as to which of the these two, the dirham or the dinar, or both, are the unit of value for the purpose of determination of the prescribed punishment. This is because the two precious metals are not always in precise correlation with one another, and factors of time and place often move their prices differently according to local preferences. Imam Mālik maintains that both are units of value, each in their own right, and has in this connection added that the people of Baghdad look at the dominant practice and the people's preference, which may be either for the dirham or the dinar. Imam al-Shāfiʿī has held that the standard is the gold dinar, which is the base (*al-aṣl*) in the evaluation of other goods and commodities. In part these differences are due to variations that are also observed in several hadith reports available on the subject and the way these reports have been interpreted by reporters and commentators.[8] The key Ḥanbalī scholar Ibn Qayyim al-Jawziyyah understood the purpose of identification in the Sunnah of the Prophet of one-quarter of a gold dinar as the quorum, suggesting that this is sufficient to provide a person and his family with sustenance for a day and a night of an average kind of food without prodigality or stinginess.[9]

Whereas the majority of scholastic jurists have considered a quantitative quorum for stolen goods, it is of interest to note that Ḥasan al-Baṣrī (d. 110/728), Dāwūd al-Ẓāhirī (d. 270/885), and the Kharijites maintained that amputation applies to any amount, small or large. They took this position on the analysis apparently based on how the Qur'an simply orders the punishment of mutilation for a thief and makes no reference to any quantity of stolen goods as such. The majority position on this is that the Qur'anic verse in this regard has been specified by way of specification of the general (*takhṣīṣ al-ʿām*) by the Sunnah of the Prophet.[10] Yet as our review of the

Sunnah has shown, there is wide variation on what precisely the Sunnah has specified and how the various schools of law understood it.

Muḥammad Salīm al-ʿAwā, a prominent Egyptian jurist and author of important works on Islamic criminal law, draws the conclusion that one should depart from a fixed amount. But one should also revisit, from time to time, the quorum value in line with the prevailing prices of food commodities, fluctuation in the prices of gold and silver, and the socioeconomic realities of the country and people. He has also cited, in this connection, two different positions taken—one by the Azharite scholars and the other by an Egyptian member of Parliament—on the subject of quorum values for imposing prescribed punishments.[11] Having examined these positions, al-ʿAwā wrote that the correct understanding of Sunnah on this subject is that the Prophet disallowed mutilation for small amounts of goods below a certain limit. This decision also represents the juristic opinions of all the schools to the effect that pilferage and theft of negligible amounts do not invoke the prescribed punishment. What is considered a "small amount" in people's eyes is also liable to change in the light of prevailing socioeconomic conditions and general customs at the time the offence was committed. The best course to take for those who seek to ascertain the shariah position is therefore to consider the effective cause and purpose of the shariah ruling and not necessarily to recite the views and quantitative specifications of fiqh jurists on the quorum issue. For the fiqh scholars may have arrived at certain conclusions, which reflected their *ijtihād* at the time but that may not be suitable for our time: "It is not advisable therefore always to stand by scholastic positions of the fiqh scholars of the past regardless of their suitability or otherwise with the people's living standards" because they work under a totally different set of conditions.[12]

This is a sound analysis. It may also be in order for us to take it a step further and relate it perhaps to the changing socioeconomic conditions of a country and its customs. These conditions tend to be changeable. Taxpayers are usually allowed to claim a minimum amount for personal needs as tax-exempt, and any income above that level is subjected to income tax. This may arguably provide an indicator of the poverty line in a particular country and may be considered relevant to the purposes of the present discussion. One need not perhaps have a fixed quantity of *nisāb* for imposing a *taʿzīr* punishment on theft; but for the capital punishment to apply, relevant factors such as the availability of social support for the poor, per-capita income of the country or locality, and personal needs should be considered. The subject would admittedly call for further scrutiny by

scholars and researchers, but it would be a worthwhile step to take if one were to bring the theory of *ḥudūd* in regards to theft closer to the prevailing socioeconomic conditions of our time.

Differences of opinion also obtain regarding the question as to whether the thief should know the value of an object at the material time, for if he was unsure of the quorum value and knew it was above that level he might have hesitated. Some Ḥanafī and Mālikī jurists have disregarded the question and found it sufficient to ascertain the element of intention. If the thief intended to steal, his knowledge of the value, it is said, is immaterial. But custom, circumstantial factors, and experience do play a role.[13] One would have thought that personal knowledge of the thief, important as it is, is rather too subjective to be reliably ascertained; it may play some role but not a highly significant one.

Disagreement has also arisen among the leading schools of law over the quorum value of theft by a group of persons in collusion. Should each one of them fulfill the quorum requirements, or is the quorum value calculated as one for the whole group? A similar question has arisen over the application of safekeeping (*ḥirz*) as to whether only the person who took the goods out of the safe place is punished with mutilation or whether the whole group may be so punished. The majority, including Imams Mālik, al-Shāfiʿī, and Ibn Ḥanbal, have held that one quorum is enough and all of them are liable to mutilation, whereas Abū Ḥanīfah has held that the quorum requirement must be individually fulfilled. The Shia school has recorded two different views, one of which is that if two people steal, one quorum is enough for both to be punished. The second view maintains that only if the share of each of the two thieves reach the quorum are they both liable to the punishment. An illustration is given: if one person makes a hole in the wall and the other takes the goods away, neither is liable for capital punishment. Detailed views and replies are given with regard to the question as to who actually takes away the goods from the safe place. The views offered incline toward saying that shariah requires one hand mutilated for one offence and not expanding this to a larger number, but they go on to say that this is not accurate. The answer depends on a more accurate study of the circumstances. It would vary, for instance, with regard to a house that has four walls, a main entrance, and many rooms that are likely to raise detailed questions on how they are used.[14] Questions have also arisen with regard to kidnapping and stealing from a child. In our view in the case of capital punishment for theft, the quorum should be individually fulfilled, although this question may be more flexibly decided

in the case of *taʿzīr* punishment. This may also be stated regarding the issue as to who removed goods from safe custody. Only the person who played the principal role should be liable for the higher punishment, and others involved may perhaps be only subject to *taʿzīr*.[15]

Furthermore, the goods must be capable of being owned and must also have market value. There are goods, on the other hand, that may have market value but no juridical (*sharʿī*) value as such. Items such as pigmeat, idols, gambling tools, and liquor are forbidden for Muslims and can only be owned by non-Muslims. As a consequence, theft of these items can only be penalised if they are stolen from a non-Muslim. A further requirement for the enforcement of capital punishment is that the thief does not have the goods legally at his disposal nor is he a co-owner. For example, a person who steals from state property or the public treasury, a soldier who steals from the spoils of war, or even a guest who stays in one's place by invitation cannot be punished with amputation as they have a share, however small or insignificant, in these assets or a kind of implied permission to be there.[16]

Issues over Safekeeping (Hirz) and Ownership (Milkiyyah)

Amputation does not apply if the stolen goods are not properly guarded or are kept in an inadequate or unlikely place. Locked houses, shops, safety boxes, and coffers count as guarded places, taking also into account the nature of the object. Stealing fruit hanging on trees in public places does not invoke the prescribed punishment; and a stable is a suitable place for keeping horses but not for keeping jewellery. Similarly, an item found in a public bath or mosque does not qualify under the requirement of safekeeping (*ḥirz*). Imam Abū Ḥanīfah also precludes from the prescribed punishment the taking of fruits hanging from trees in guarded places, even when not accessible to the public, based on the analysis that such fruit is usually perishable and thus not subject to the prescribed punishment. However, if such fruit is picked and then placed in containers that preserve them, or if they are dried for future use, they may be excluded from the perishable category.[17] Furthermore, the judge must ask the witnesses for details of the manner, place, and modality of the theft. Details may reveal factors that could well suspend the prescribed punishment. Thus if a thief has taken something away from a house or room without actually entering the place,

this may fail to qualify the requirements of taking something away from a guarded place. Safekeeping in this case is signified by the house or room, which, technically speaking, the thief has not violated.

The leading schools of Islamic law also preclude from capital punishment the stealing of fresh and perishable foodstuffs and goods that are not storable for future use. Similarly, goods that are originally permissible (*mubāḥ*) for everyone to take, such as game and firewood, are precluded from the application of prescribed punishment. The latter is further restricted by the presence of doubt (*shubha*) as already mentioned. The Ḥanafī and Shia schools have included in *shubha* uncertainty that may arise from the existence of a contract or an understanding over the existence of a right on the part of the thief for the stolen goods. Furthermore, the capital punishment cannot be applied if someone steals copies of the Qur'an.[18]

The correct understanding of safekeeping (*ḥirz*), it is observed, should be in line with the general custom, which may well be changeable from time to time. Any place that is considered safe for the stolen goods, according to the prevailing customary understanding of people, should be considered as *ḥirz* and not necessarily the *taqlīdī* (imitationist) views recorded by earlier jurists.[19] The views have also been criticised of fiqh scholars who held that punishment is not applied to a thief who steals from the assets of a public treasury or from other public places, especially when the thief happens to be working there or is allowed to enter. The correct view recorded by some jurists, in al-ʿAwā's assessment, is that one who steals from public places should not be treated differently from one who steals from a private place. The first should even be prioritised in the matter of punishment. This is because those who are employed and allowed to enter the public treasury and other government offices are trustees and custodians of the state as well as guardians of state or public property. Theft from such places can involve large amounts that signify a serious breach of trust for government employees and officials. This should even be considered an aggravating factor, rather than a mitigating one, which has been the case in much of the scholastic writings on the subject.[20]

Disagreement has also arisen over the validity of imposing the capital punishment of theft for stealing goods that are subject to litigation and disputed ownership. The majority maintain that the punishment of theft is not enforced in the case of goods whose owner is not known unless he comes forth and establishes his ownership. The owner must in all cases

be known and also initiate a claim.[21] In the event where witnesses voluntarily come forth and give testimony regarding theft of goods belonging to someone who is absent, the witnesses may be granted a hearing, as there may be an issue over protection of the Right of God, or of public right, but the capital punishment of theft cannot be enforced unless the owner or his representative is present and presses a claim against the thief.[22]

Questions have arisen, moreover, as to who is authorised to initiate litigation (*khuṣūmah*) in the case of theft. In response to this the Imam Abū Ḥanīfah has held that anyone who validly possessed the goods at the time they were stolen—which includes, in addition to the owner, one who may be holding them in trust (i.e., the *amīn*) or surety, such as a trading manager (*muḍarīb*) or mortgagor—all of whom are qualified to claim return of the stolen goods and initiate litigation, although Imams al-Shāfiʿī, Ibn Ḥanbal, and Zufar b. Huzayl (the latter a disciple of Imam Abū Ḥanīfah) maintain that only the owner may initiate litigation. Unlawful possession does not entitle one to litigation. Thus if someone steals the goods from the thief, the latter will have no *locus standi* to litigate for their return. Since he has no valid title on the goods, stealing from him would be tantamount to picking it up from a public path. This would also mean that the capital punishment cannot be enforced on the second thief as this second theft would not qualify the condition of stealing from a lawful owner.[23]

Theft has two aspects, as already noted: one is the Right of God (*ḥaqq Allāh*) aspect, which is predominant; and the other is the Right of Man (*ḥaqq al-ādamī*), which is deemed to be the lesser part and consists of a private claim for the return of the stolen goods or compensation to their owner. Whenever a claim of theft is proven, two main consequences follow, one of which is liability for the return of goods or compensation regarding the private right; and the other is applying the punishment for violation of the public right. There is some disagreement, however, on the first of these. The Ḥanafī school maintains that the two aspects are not separate in that, once the thief is duly punished, he is not liable for anything else. The reason given is that the Qur'an only imposes mutilation and makes no reference to compensation. They have also referred to a hadith on the authority of ʿAbd al-Raḥmān b. Awf, who states that the Prophet said, "When the thief's hand is mutilated he is not liable for compensation" [اذا قطع السارق فلا غرم عليه]. Some Ḥanafī scholars have added that he must return the stolen goods if they still exist but is not liable to compensation if they are not.[24]

Imams al-Shāfiʿī and Ibn Ḥanbal have held on the contrary that liability for compensation and punishment always go together and the thief remains liable even after punishment. For theft involves transgression of both the Right of God and the Right of Man; the former is satisfied by punishment and the latter by compensation. They say that one of the narrators of the hadith of ʿAbd al-Raḥmān b. ʿAwf is unknown (*majhūl*), and they have instead referred to another hadith that "the taking hand is liable for what it has taken until repayment [على اليد ما اخذ ت حتى تؤده]." Hence the thief must return the goods if they exist, but he has to pay the price or its equivalent independently of whether or not his hand is mutilated. Regardless of his own financial status—solvent or insolvent—he must return the goods or pay compensation. Should there be more than one victim of the theft, the thief remains answerable to each one of them, even regardless of whether or not they all initiate litigation. Imam Mālik also concurs with these positions except for adding that, after mutilation of the hand, the thief is only liable to compensation if he is solvent and can afford to pay. The Shii position on this corresponds with that of the Ḥanafī school to the effect that liability for compensation does not combine with mutilation.[25]

Proof and Punishment of Theft

There is general agreement among the leading schools, both Sunni and Shia, that the capital offence of theft is proven by the testimony of two upright male witnesses, or one male and two female witnesses, or even one male witness and a solemn oath by the defendant and also by confession of the thief. The preferred position is, however, that the solemn oath is not admissible in the proof of theft. Should the proof of theft fall below these, the judge may not order the prescribed punishment but may still penalise the accused with a discretionary *taʿzīr* punishment. The confession need not be repeated four times, as was the case in the proof of *zinā*; hence a valid confession by a legally competent person is sufficient if made only once. This is the position of the Ḥanafī, Shāfiʿī, and Ẓāhirī schools, which represents the standard position with regard to testimony in most litigations, although even here the Ḥanbalī school, Abū Yūsuf the disciple of Imam Abū Ḥanīfah, and the Shia Imamiyyah have maintained that confession should be made twice, not just once, in order to eliminate all doubt, and that the prescribed punishment of theft is not implemented

by only one instance of confession. Quoted in authority for this is a hadith narrated by the Companion Abī Umayyah al-Makhzumī who reported that a thief (not named) was brought before the Prophet and confessed that he had committed theft. Then the Prophet asked him questions that made the man repeat his confession two or three times before he was ordered to be punished. Hence it is concluded that the judge must meet the thief and ask for confirmation and repetition of the confession so as to remove doubt before sentencing him. Quoted in authority for this is the precedent of the fourth caliph ʿAlī b. Abū Ṭālib, who apparently drew a parallel between witnesses and confession. Two witnesses are thus matched by two instances of confession, and it is further added that the confession is repeated in two different settings. One instance of confession is thus not enough for imposing the capital punishment, but the judge may consider punishing the accused by way of *taʿzīr* and also order him to return the goods if still available or repay their price to the owner.[26]

Confession is considered as a weak method of proof and may be retracted any time prior to punishment or when the *ḥadd* of theft is suspended as a result—but then it is added that this retraction is effective in respect only to the Right of God aspect of the offence. Retraction does not, in other words, affect the private right aspect of the theft. The owner of the stolen goods may still proceed to claim compensation, and the judge is also within his rights to order a lesser *taʿzīr* punishment based on his original confession even if subsequently retracted. The Ẓāhirī school maintains, however, that retraction of a confession, once validly made, is of no effect, as they also do not suspend *ḥudūd* on the basis of doubt/*shubha*.[27]

The judge must also ask the thief and witnesses about the time of the incident as there may be a significant lapse of time that may well bring the rule of expiration (*taqādum*) of testimony into the picture. Should there be a lapse of time involved, the thief is held liable for the private right aspect of the claim but not the *ḥadd* punishment, which represents the public right (*ḥaqq Allāh*). The other three Imams do not recognise expiration and do not agree to it, saying that valid testimony may be admitted regardless of expiry of time provided that the judge is satisfied with it. Yet a variant report from Imam Aḥmad b. Ḥanbal has it that he considered expiration applicable to the *ḥudūd*.[28]

The judge must also ask about the place where theft took place, for if it happened to be in a country at war (*dār al-ḥarb*) the punishment is likely to be suspended. Some of these details are also required to be made known in the case of confession except for lapse of time, which does not

affect the validity of a confession, nor is the confessor asked to specify the place where he committed the act. But other details pertaining to the safeguarding (*ḥirz*), quorum value, and other specifications of the stolen goods, as well as his own condition, may be included in the confession and the judge may ascertain and enquire about them.[29]

Whereas the majority have understood mutilation by severing the right hand from the wrist, according to the Shia, based on the precedent of the fourth caliph ʿAlī, mutilation is required only of the four fingers of the right hand such that the palm and thumb are left intact.[30]

Repentance and Its Impact on the Punishment of Theft

The leading schools, including the Shia Imamiyyah, have validated amputation of the left foot for the second offence except that in Shii law it means the foot from the middle joint such that leaves the heel and the person's ability to walk intact. This is based on the authority of the fourth caliph, ʿAlī b Abi Ṭālib, whose precedent on this is followed by Shii jurisprudence. The Sunni law position on this is mutilation of the left foot from the ankle.[31] With regard to repentance, the Shiis hold that the prescribed punishment of theft is suspended by virtue of repentance before prosecution and judgment but not thereafter, yet they add that, based on a weak opinion, the Imam may drop the prescribed punishment on account of repentance even after confession. Furthermore, mutilation is contingent on the demand for it by the victim of theft, which must be made prior to adjudication and arrest, failing which the judge may not order mutilation. The victim's demand is of no account, however, if it is after prosecution and judgment.[32]

The second amputation has been disputed, however, and there is a minority opinion against it, for the simple reason that the Qur'an is silent on it (cf. al-Māʾidah, 5:38). The majority (*jumhūr*) position that approves of the second amputation is based on rather a questionable interpretation of the Qur'anic verse—saying that *aydihima* (their hands) therein also include feet, drawing the drastic conclusion that the foot is mutilated from the ankle. Two prominent Companions, Ibn ʿAbbās and ʿAṭa, are reported to have held that no further amputation is valid for the second (and subsequent) theft, and they supported this by citing the Qur'anic text, "And your Lord is never forgetful" [وما كان ربك نسيا] (Maryam, 19:64). Ibn Ḥazm of the

Ẓāhirī school has strongly criticised the majority ruling here and found it to be quite remarkable that such drastic positions were taken (mainly by the Ḥanafīs and Mālikīs) without there being any evidence in the sources to support them.[32] Al-ʿAwā's enquiry into this has also led him to the conclusion that the minority opinion here is "nearest to the spirit of Islamic law."[33] Our guideline on this issue should surely be the hadith of the Prophet, discussed in the following section, which states that if there is a choice between leniency and severity one should, in the context of punishments especially, adopt the course that leads to leniency and not otherwise.

The Hudud Bill of Kelantan, Malaysia, also follows the mainstream fiqh position and penalises the first offence of theft with amputation of the right hand from the wrist. The second offence of theft is punishable, however, with amputation of a part of the left foot "in the middle of the foot in such a way that the heel may still be usable for walking and standing" (Clauses 6 and 52). This is in accord with the precedent of the fourth caliph ʿAlī, who has ordered mutilation of the foot from the middle joint—as is the position also taken by the Shia Imamiyyah.[34]

As for the admissibility of repentance and its bearing, if any, on the *ḥadd* of theft, it is generally held that the *ḥadd* punishment of mutilation is not pardonable by anyone, including the victim or the head of state, nor may it be substituted, once it is proven, by any other punishment.

In support of this is quoted the Prophet's well-known instruction that *ḥudūd* may be exonerated prior to being reported to the authorities, but once reported they must be implemented. No one, it is said, has disagreed with this position except for the Zaydiyyah Shia, who maintain that mutilation is suspended as a result of repentance as this is the clear purport of the Qur'an. Even if there are a number of persons involved in the theft, they all stand a chance to be exonerated if they all repent. They have further added that it is the obligation generally for the Imam to enforce *ḥudūd*, and to suspend its enforcement based on the public interest (*maṣlaḥah*), on a carefully selective basis at least, or to delay enforcement to another time if the public interest would so require. However some in their ranks have denied this power to the Imam in two cases, namely the *ḥadd* of slander (*qadhf*) and that of theft.[35]

Al-Jazīrī elaborates, "the leading Imams of jurisprudence have agreed that when the thief repents and renounces sincerely his act, and regrets it while there are also indications of his sincerity and remorse, and he

resolves not to repeat his offence a second time, God Most High admits his repentance as is clearly declared in the Qur'an [al-Mā'idah, 5:39, quoted in full]. For God has [promised] to forgive the blunder of His repentant servant and exonerate him."[36] This line of discourse is continued with a degree of emphasis when al-Jazīrī further quotes two hadiths that "repentance wipes out what has preceded it [التوبة تجب ما كان قبله] and that "one who repents his sin is like the one who has not incurred a sin."

(التائب من الذنب كمن لا ذنب له)

It is further added that when the culprit undergoes the *ḥadd* punishment, it become an expiation (*kaffārah*) for him, and he will not be punished for the same in the hereafter. For the Prophet, pbuh, has said:

> One who has committed a sin in this world and has been punished for it, God's justice does not admit of the prospect of doubling the punishment in the hereafter.

(من أصاب في الدنيا ذنبا فعوقب به فاالله أعدل من أن يثني عقوبته على عبده).

Yet all of this seems to have been subsumed under moral advice. The *ḥadd* of mutilation for theft is consequently not suspended by repentance, nor even by the offender's purposeful change for the better and whether or not he stays clear of criminality for a long time. Once the crime of theft is proven, it must be punished. The main reason given for this is that suspending the *ḥadd* due to repentance will encourage criminality and diminish the deterrent effect of *ḥudūd*. Some evidence in the hadith has also been quoted to support this position [37] It is hardly an overstatement to say that the Prophet has tried to strike a balance between the concerns for the rule of law and enforcement of *ḥudūd*, on the one hand, and consideration of concealment (*satr*) and intercession (*shafā'ah*) on the other. This was at a time when Islam was faced with the larger challenge of establishing law and order in a hostile tribal environment. The Prophet has exercised both leniency and stricture in the application of *ḥudūd* in light of his insight and knowledge of the personality and character of individuals and the prevailing conditions of those times.

What al-Jazīrī and others have stated on the need for consistency and firmness in the application of *ḥudūd* penalties is, of course, a valid argument and hard to turn away from, nor is it our purpose to dispute the

soundness of that position. But this also does not justify total exclusion of self-correction, rehabilitation, and reform from the purview of Islamic criminal justice in respect to *ḥudūd*, especially of the *ḥadd* of theft. The scriptural basis of what is presented here is clearly in the Qur'an, not just in the verse that specifies the *ḥadd* of theft (al-Māʾidah, 5:39) but as a consistent feature of the Qur'anic outlook on repentance and reform that is present in all of the *ḥudūd* verses. What is proposed here is that both of these positions are valid and that repentance should not be excluded altogether but treated as an integral part of the penal philosophy of *ḥudūd*. No one would say that repentance and reform should be featured so forcefully that it would erode the deterrent effect of punishment, but no one can deny that including them is an integral part of both the Qur'an and Sunnah. An integrated approach is therefore important if one were to take a fresh look at *ḥudūd* in our time. Finding a correct balance of these two admittedly somewhat conflicting interests is the crux of the challenge of the *ḥudūd* sentencing policy, and if successfully attempted, it may well usher the way toward a more nuanced and also realistic approach to the enforcement of *ḥudūd*.

Amputation of the hand for theft is still used today in countries like Iran, Saudi Arabia, and Northern Nigeria. In Iran, amputation as punishment was described as "uncommon" in 2010, but in 2014 there were three sentences of amputation of fingers, but not the complete hand; and amputation was carried out as punishment four times in 2012–2013.[38]

VII

*Banditry and Terrorism (*Ḥirābah, *also* Qaṭʿ al-Ṭarīq*)*

Ḥirābah is the nearest shariah concept to contemporary terrorism. But modern technological changes have altered the nature of this crime so much that corresponding adjustments in the law of *ḥirābah* are inevitable. Remote control devices, precision timing of devices, vastly destructive weapons, and even suicide bombings were not addressed by early Muslim jurists in their scholastic articulations of *ḥirābah*. The Qur'anic conception of this crime, on the other hand, is broad enough to accommodate the needed adjustments. This chapter attempts to reconnect the fiqh of *ḥirābah* to its Qur'anic origins. The discussion is necessary, because the global reach of the scourge of contemporary terrorism has caused great pain and anguish not only to Muslims but also to humanity at large. To facilitate this analysis, an attempt has been made to comprehend contemporary terrorism in its own terms. The discussion therefore begins by defining terrorism and *ḥirābah*. A review of the principal Qur'anic verse on *ḥirābah* is presented at the outset and then followed by a review and analysis of the fiqh of *ḥirābah* in the works of leading schools of Islamic law. Since *ḥirābah* is one of the prescribed *ḥudūd* crimes, the Qur'an provides a fourfold punishment for *ḥirābah*, which Muslim scholars have elaborated in considerable details. The present discussion seeks to bridge the gap between the fiqh conception of *ḥirābah* and its contemporary manifestations, while taking into consideration the salient new features of contemporary terrorism, such as suicide bombing, which have not been addressed in the traditional fiqh. Also presented is a roundup of Muslim responses to global terrorism and a conclusion.

Definition and Meaning of Ḥirābah

Ḥirābah literally means "to fight or wage war." It denotes terrorism and highway robbery (*qaṭʿ al-ṭarīq*) as well as any act that involves the use or threat of using force to terrorise and intimidate people passing through streets on their way to places of business, homes, shops, and so forth. *Ḥirābah* also covers all instances of mass destruction and sabotage, such as poisoning drinking water, food, or air, as well as gross criminal damage to the peace, security, and economic livelihood of communities and states. According to the general consensus of Muslim jurists of all the leading schools of jurisprudence, both Sunni and Shia, *ḥirābah* is a major sin and a capital *ḥudūd* crime.[1] *Ḥirābah* is the nearest shariah legal concept to terrorism, notwithstanding some differences between them, which will be explored in the following discussion. This presentation refers mainly to the Qur'anic conception of *ḥirābah* more than the fiqh elaborations thereof; the latter tend to specify the broader Qur'anic positions in line with prevailing conditions of earlier times. This too will be explained. It is hoped that the interpretation and analysis offered here will help bridge the gap between the fiqh conception of *ḥirābah* and contemporary terrorism. The Qur'anic conception of *ḥirābah*, the fiqh framework of the same, and contemporary terrorism thus constitute the three major components of this presentation.

Concerning terrorism, it has proven difficult to find a comprehensive definition for it, as many years of fruitless attempts in the United Nations have proven that it cannot be defined to the satisfaction of everyone: "There is no all-encompassing definition of terrorism, there are only common elements that are used to determine actions as such, and actions that promote fear."[2] The very inadequacy of this description of terrorism is problematic as one cannot clearly draw the lines of distinction between violence, terrorism, freedom fighters, and separatist movements. The one factor that connects all forms of terrorism, however, also underlies *ḥirābah*: the desire to cause fear, terror, and insecurity in society through the indiscriminate use of violence, often for political ends. This characterisation of both terrorism and *ḥirābah* covers acts of terror perpetrated by individuals, groups, and even states (as exercised by Israel against the Palestinian people).

Sherman Jackson has compared *ḥirābah* with "domestic terrorism" in the United States and finds similarities between them. According to a definition attributed to the Federal Bureau of Investigation (FBI), terrorism

is "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political goals."[3] Jackson adds that a principal ingredient of this definition is clearly its focus on the inducement or spread of fear, which is also how Muslim jurists have described *ḥirābah*. Another aspect in common between *ḥirābah* and "domestic terrorism" is a certain lack of personal relationship between the parties in the sense that the victim and terrorist may not even know one another. A fresh interpretation of the Qur'an on *ḥirābah* is offered in the following discussion to attempt to relate the Qur'an's guidelines to contemporary terrorism.

Terrorism in the oft-cited phrase "the war on terror" refers to violent, fear-inducing attacks by individuals, groups, or the state against civilians. There is thus a distinct exclusion of attacks against the military and other state agents.[4] Other definitions include "the use or threat of action" that endangers life, or poses a serious risk to health or to property, and is "designed to influence the government or to intimidate the public, or a section of the public"; and where "the use or threat of violence is made for the purpose of advancing a political, religious, or ideological cause" (Section 1 of the Terrorism Act 2000 of the United Kingdom).

The discussion that follows begins with a review of the scriptural evidence on *ḥirābah* and proceeds to examine the fiqh writings on the subject and the punishment of *ḥirābah*.

Ḥirābah *in the Qur'an and Sunnah*

It is due to the extreme gravity of *ḥirābah* that the Qur'an refers to its perpetrators and those who spread terror and insecurity as the ones who "wage war on God and His Messenger." *Ḥirābah* in the Qur'an is envisaged as a composite crime that can subsume banditry, highway robbery, terrorism, theft, and murder. It is a *ḥudūd* crime consisting usually, but not necessarily, of collective activity committed by more than one person. In addition, it is seen as a crime where everyone acts on behalf of the group; if the crime is committed by one of them, all of them are liable for the consequences. The principal Qur'anic verse on *ḥirābah* thus reads:

> The only punishment of those who wage war on God and His Messenger and strive with might and main for mischief-making through the land (*fasād fī'l-arḍ*) is execution or crucifixion, or mutilation of their hands and feet on alternate sides, or banishment

> from the land. Such will be their disgrace in this world, and in the Hereafter theirs will be a heavy punishment. Save those who repent before you overpower them. For know that God is Forgiving, Most Merciful. (al-Māʾidah, 5:33–34)

إِنَّمَا جَزَٰٓؤُاْ ٱلَّذِينَ يُحَارِبُونَ ٱللَّهَ وَرَسُولَهُۥ وَيَسۡعَوۡنَ فِي ٱلۡأَرۡضِ فَسَادًا أَن يُقَتَّلُوٓاْ أَوۡ يُصَلَّبُوٓاْ أَوۡ تُقَطَّعَ أَيۡدِيهِمۡ وَأَرۡجُلُهُم مِّنۡ خِلَٰفٍ أَوۡ يُنفَوۡاْ مِنَ ٱلۡأَرۡضِۚ ذَٰلِكَ لَهُمۡ خِزۡيٞ فِي ٱلدُّنۡيَاۖ وَلَهُمۡ فِي ٱلۡأٓخِرَةِ عَذَابٌ عَظِيمٌ. إِلَّا ٱلَّذِينَ تَابُواْ مِن قَبۡلِ أَن تَقۡدِرُواْ عَلَيۡهِمۡۖ فَٱعۡلَمُوٓاْ أَنَّ ٱللَّهَ غَفُورٞ رَّحِيمٞ.

On the authority of the Companion Anas b. Mālik, Qur'an commentators have identified the incident of ʿUraniyyin (from the tribe of ʿUraynah) as the occasion of revelation of this verse:

> A group of people came to Medina but found its climate unsuitable and they became unwell. They came to the Prophet and informed him of their condition. The Prophet advised them to go where the camels of Ṣadaqah were, drink their milk and urine and rest. They did so and recovered well. But then they renounced Islam, killed the shepherd and drove off with the camels. Upon hearing this, the Prophet ordered that they be caught. They were chased, caught and brought to the Prophet who ordered that their hands and feet be mutilated and their eyes gouged and were left in the heat to die.[5]

أن ناسا من عرينة قدموا على رسول الله صلى الله عليه وسلم المدينة فاجتووها فقال لهم رسول الله صلى الله عليه وسلم إن شئتم أن تخرجوا إلى إبل الصدقة فتشربوا من ألبانها وأبوالها ففعلوا فصحوا ثم مالوا على الرعاة فقتلوهم وارتدوا عن الإسلام وساقوا ذود رسول الله صلى الله عليه وسلم فبلغ ذلك النبي صلى الله عليه وسلم فبعث في أثرهم فأتي بهم فقطع أيديهم وأرجلهم وسمل أعينهم وتركهم في الحرة حتى ماتوا.

In a renowned hadith all the major collections of hadith have reported, the Prophet has also said: "One who carries arms against us is not one of us [من حمل علينا السلاح فليس منا].[6] This is further endorsed in another similar hadith that says, "One who unleashes his sword on us is not one of us [من سل علينا السيف فليس منا].[7]

In yet another hadith, the Prophet said, "All that belongs to a Muslim is forbidden to other Muslims: his blood, his property and his honour."[8]

كل المسلم على المسلم حرام : دمه وماله وعرضه.

Next we review the fiqh scholastic positions on *ḥirābah*.

A Fiqh *Discourse on* Ḥirābah

Fiqh scholars have been assiduous in their efforts to protect the community from those within its midst who sought to bring it harm through violence and terror. They did so through developing legal constructs that served this interest, and in doing so took their lead mainly from the Qur'anic dispensations on *ḥirābah*. The law of *ḥirābah* has also not remained static due partly to a degree of flexibility in its Qur'anic expositions that allowed space for interpretation, which the jurists have attempted from time to time. Yet the creative endeavours of jurists and interpreters were negatively affected by the so-called closure of the door of *ijtihād* around the fifth/eleventh century. This is partly why a contemporary observer of terrorism will notice a certain gap in the fiqh discourse of *ḥirābah*, which is of medieval origin for the most part. The narrative developing in this chapter is self-evident on the need for further reconstruction and renewal toward a more relevant understanding of *ḥirābah*.

The fiqh discourse on *ḥirābah* is focused on highlighting the main features and characteristics of this offence rather than advancing a comprehensive theoretical framework for it. It also revolves mainly around the meaning and implications of the principal Qur'anic verse on *ḥirābah* and application of the fourfold punishment therein—depending on the presence or otherwise of killing, taking of money and property, and obstructing free movement of people in a public space.

Ḥirābah resembles mutiny/rebellion (*baghy*) but differs from the latter in that mutiny opposes a legitimate authority or government on the basis of a plausible interpretation (*taʾwīl*), while the agent of *ḥirābah* does so without any such pretence.[9] *Ḥirābah* also differs from theft in that theft means taking another's property surreptitiously, whereas in *ḥirābah* if property is taken it is done openly by force.

The Ḥanafī jurist, al-Kāsānī (d. 587/1189), defined *ḥirābah*, or *qaṭʿ al-ṭarīq*, as "attacks upon pedestrians for the purpose of taking their property by force in such a way that people are rendered unable to pass freely through the streets. The attacker/s may be a group or a single person that possess overwhelming power to obstruct the public passage, and may be using weapons or weapon-substitutes such as sticks and stones."[10]

The Mālikī school described the agent of *ḥirābah* as "anyone who brandishes weapons in order to obstruct free passage in the streets and renders it unsafe to travel by killing people, taking their money, and spreading corruption in the land. The agent of *ḥirābah* (*muḥārib*) may be a Muslim or a non-Muslim, free or slave, and it may be committed in a city or countryside,

by an individual or group—[all this] simply because the Qur'an has not specified the perpetrator in any such ways."[11]

The Shāfiʿī school identifies the agents of *ḥirābah* in similar terms but stresses that the perpetrator must be a competent person (*mukallaf*), Muslim, *dhimmī*, or apostate who is bound by the injunctions of Islam and has overwhelming power to subjugate others and take their money and property, with such actions occurring away from a main city.[12]

The Shia Imamiyyah identifies the agent of *ḥirābah* as "anyone who brandishes weapons in order to terrorise passengers during night or day, on land or sea, even if the perpetrator is not a known criminal."[13] The crime is proven either by a valid confession, even if it is not repeated, or by the testimony of two just witnesses; the latter may include some of the suspects themselves giving testimony against the others. This is a *ḥudūd* crime and carries a fourfold punishment as the Qur'an has specified, but the Imam is entitled to select which will be applied.[14]

The Ẓāhirī school defines a *muḥārib* (terrorist) as one who insolently terrorises street passengers and spreads corruption through acts of terror in the city or countryside, individually or collectively, exhibiting overwhelming power with or without the use of weapons.[15] This may be said to be broad enough to encapsulate many of the points of the preceding definitions.

Muslim jurists have held the two material elements of *ḥirābah* to be (1) a show of weapons by assailants ready to terrorise people and block their normal movements on public passages and (2) killing, looting and taking people's property forcefully, especially in areas outside the main cities. Hence if one or two persons commit raids on a large caravan, plunder its property, and run, they would not be committing *ḥirābah*, but if they so act against a small caravan manned by a few persons, they would be considered guilty of *ḥirābah*. There is some disagreement on whether *ḥirābah* can also be committed in urban areas. For Imam Mālik, it can be committed within the city or outside, and it matters little whether it is by one person or a group of persons, males or females, Muslims or non-Muslims. This is because the Qur'anic verse on *ḥirābah* is conveyed in general terms without any specification or exception—hence it remains in its originally general and inclusive form. The Mālikī school also includes under *ḥirābah* attacks on the honour of people, their women, and their families with a show of superior force. Thus if an armed attacker enters another's private dwelling to dishonor the victim and his family, be it within or outside the city, he commits the crime of *ḥirābah*. The Ḥanafī school maintains that *ḥirābah* can only be committed in secluded places away from main cities,

as within the city surroundings the public and the authorities are likely come to the aid of the victim. Imam al-Shāfiʿī has held that an attack in the city can constitute *ḥirābah* if the government/sultan is weak and lacks effective power, and if the attacker is also capable of striking fear on the part of the victim. The Ḥanbalī understanding of *ḥirābah* resembles that of the Shāfiʿī school in that it may be committed in cities or outside the cities and the perpetrator may be armed with any kind of weapon, or that which may resemble a weapon, provided it can create fear and can terrorise. The Shia also regard possession of weapons of any description as a requirement of *ḥirābah*, and the offence may take place anywhere provided that the perpetrator possesses the capacity to terrorise their victim. The majority (*jumhūr*) view on this is that committing *ḥirābah* in cities and urban centres is an aggravating factor that renders the crime even more dangerous.[16]

It is essential that the assailants are superior in strength and carry arms such that their victims cannot overpower them nor can they escape. *Ḥirābah* is also committed openly (*bi'l-mujāharah*) and it differs in this respect from theft. Hence if a group of people act surreptitiously and commit theft or kidnapping, they would fail to fulfil the requirement of *mujāharah*. Aggravating circumstances consist of taking the property of the victim and/or killing them. As is clearly stipulated in the verse of *ḥirābah,* repentance by the terrorists before capture and arrest exonerates them from capital punishment but does not necessarily exempt them from criminal responsibility for other crimes committed during the attack, such as homicide, injury, and armed robbery, which combine both public and private rights (*ḥaqq Allāh* and *ḥaqq al-ādamī*).[17]

The Ḥanafīs are in the minority to stipulate that the bandits must be men and that women are not punished by the prescribed punishment if they perpetrate the crime, as they argue that the show of power and vanquishing is a condition that is only suited to men. If women join hands with men in banditry, according to Imam Abū Ḥanīfah and his disciple Muḥammad al-Shaybānī, they are not subject to the *ḥudūd* punishment. Abū Yūsuf, the Imam's other disciple, has held that if women directly commit killing and plunder, they are liable to the punishment of *ḥirābah* together with the men. The Mālikī, Shāfiʿī, Ḥanbalī, and Shii schools do not regard male gender as a prerequisite of *ḥirābah* in the first place. Thus if women commit banditry in groups that terrorise people and obstruct the highway, they are liable to the capital punishment in the same way as men.[18]

Many fiqh scholars have highlighted in their discussion of *ḥirābah* the concept of obstructing free movement of people in the streets,

attacking pedestrians, and taking their money,[19] But there are questions as to whether these actions play the same role in contemporary terrorism, as will be further elaborated later in the chapter. Furthermore, Imams Mālik (d. 179/795) and Abū Ḥanīfah's (d. 150/767) stipulation that *ḥirābah* is only committed in unpopulated areas would seem to be tangential to contemporary terrorism.[20] For instance, a misguided Muslim youth who under heavy indoctrination of ISIS/Daesh or the Taliban blows himself up in order to kill and destroy is most likely not after taking money but to "gain direct passage to Paradise." Nor are such nefarious acts of terror confined to unpopulated places: quite the opposite, one might say, as terrorists now deliberately choose densely populated areas and crowds as their principal targets. Even the fiqh provision that *ḥirābah* is typically committed openly with defiance of the authorities, and where culprits exhibit overwhelming power to subjugate their victims, may no longer be as relevant to contemporary terrorism. For the latter is often committed through hit-and-run tactics wherein the terrorists usually do not declare themselves openly, especially in the case of suicide bombing. Thus it becomes manifest that many of the fiqh underpinnings of *ḥirābah* reviewed here call for fresh examination and reconstruction in ways that would make the law of *ḥirābah* more relevant to contemporary terrorism.

What remains most relevant of the fiqh specifications of *ḥirābah* and its contemporary manifestations is perhaps the spreading of fear (*ikhāfah, irhāb*) and the victims' helplessness (*ʿadam al-ghawth*) against it. The helplessness aspect is described so as to mean that no effective security measures can be taken to prevent it (*taʾadhdhur al-ihtirāz*). These are often seen as the constituent elements and *sine qua non* of *ḥirābah,* as can also be said of contemporary terrorism. Rashīd Riḍā (d. 1354/1935) confirmed this when he wrote that, unlike the other *ḥudūd* crimes in which the victim may be able to defend himself, in *ḥirābah* he is helpless since he is overwhelmed by a superior force. Furthermore, whereas in other common crimes the criminal can be subjugated by the authorities, this is also not certain in the case of *ḥirābah* as it often involves challenging the authority of the government itself.[21]

Punishment of Ḥirābah

For the prescribed punishment to be carried out, the perpetrator of *ḥirābah* must be adult and competent. There is disagreement, however, when a

child or an insane person participates in the crime together with a group. The majority (*jumhūr*) have held that capital punishment applies to them all, for doubt attaches to one member of the group and that should not get in the way of enforcing the punishment. In addition, the case here may resemble a situation where a group of persons commit adultery with one woman; all of them are punished. The Ḥanafī school differs and regards the participation of a child in *ḥirābah* as an element of doubt (*shubha*) that suspends the prescribed punishment on all of them, although they may be punished otherwise under *taʿzīr*. Abū Ḥanīfah's disciple, Abū Yūsuf, has held, however, that only competent persons among the group who carried out the actual crime of *ḥirābah* are liable to capital punishment, and the child is not.[22]

The fourfold punishment that the Qur'an has prescribed for *ḥirābah* envisages death, crucifixion, cross-amputation of the hand and foot from opposite sides, and banishment. There is disagreement over the order and choice of these punishments. While the majority of Sunni schools and the Shia authorise the ruler to select one or more of these punishments in proportion to the severity of the crime, Imam Mālik has held that if the assailants have killed their victim, the Imam/judge has no choice but to order the capital punishment. The only choice he would have is whether or not to combine crucifixion with the capital punishment of death. If property of whatever value has also been taken, the offender must be punished with cross-amputation, and if there has been a holdup and looting, the offender must be sentenced to mutilation and or banishment. The other Sunni schools, and one view of the Shia Imamiyyah attributed to Shaykh Naṣr al-Dīn al-Ṭūsī (d. 672/1274), maintain that the Qur'an has provided a sequence that is indicative of a certain correlation between the crime and its punishment, which the authorities must observe: the offender is not killed if he has not committed homicide, and he is not mutilated or banished unless property is taken. Finally, if the assailant has both plundered and killed, his punishment is both death and crucifixion. A group of Muslim jurists including the Shia Imamiyyah have held, on the other hand, that the Imam has the discretion absolutely to select and determine the appropriate punishment or combination thereof regardless of whether or not homicide, holdup, and/or robbery are present. There is some disagreement on whether crucifixion should take place before or after execution, based on the analysis that crucifixion can be regarded a punishment, as per Imams Abū Ḥanīfah, Mālik, and the Shia Imamiyyah, only when the criminal is still alive, not after he has died. Imams al-Shāfiʿī and Ibn

Ḥanbal have held that the Qur'an mentions killing first, then crucifixion, and that should be the order. This is perhaps a preferable view on the assumption that crucifixion is for public display and not necessarily to make the execution more painful. It is generally held, and this is also the Shii position, that crucifixion is for three days only. There is general consensus that if the offender has neither killed nor looted, he shall be imprisoned for such a period as the court deems necessary in the circumstances of a particular case. The Ḥanafīs and some other jurists have, furthermore, equated banishment with imprisonment on the analysis that banishment to another place will place the safety of those other people at risk and that the purpose of banishment is best served by imprisonment.[23] If the bandits have taken property, the property in question must qualify according to the attributes of stolen goods, namely that it has market value, reaches the minimum quorum, and is also guarded property in which the owner has no share or claim of ownership, although, unlike in cases of theft, it may have been taken openly even with the knowledge of its owner.[24]

A question has arisen as to whether the capital punishment of *ḥirābah* combines with liability for financial compensation and bodily injuries even after the bandits have been punished. Muslim jurists have differed in their responses. The basic principle that comes into the picture here, according to the Ḥanafīs at least, is that capital punishment does not combine with liability for loss. But in their responses, most Sunni and Shii jurists have tended to separate the capital punishment of *ḥirābah* from these additional inflictions. The majority across the board is of the view that if the bandits have plundered property, they are liable to return it, if it exists, or to compensate for it if it does not. Many have held that only those who have actually taken the property are individually liable for compensation, as liability for compensation is not a part of the prescribed penalty per se and does not therefore affect one who is not directly involved. The Mālikīs have held that each one of the bandits acts on behalf of the group and thus they are all liable for compensation. As for bodily injuries, if the injured person has recovered, there is no retaliation (*qiṣāṣ*), otherwise he or she may either retaliate, if that is possible, or grant forgiveness in exchange for financial compensation. However, if the injury has worsened and leads to death, then retaliation becomes due. The Ẓāhirī school has held, on the other hand, that the crime of *ḥirābah* is committed by causing bodily injury only, even if there is no killing or plunder involved, and the bandits are therefore liable to the capital punishment of execution.[25]

The majority of Sunni schools and the Shia maintain that killing by the bandits needs no proof of intention and that the act of killing itself makes them liable to the prescribed punishment. It makes no difference whether the homicide so committed is intentional, quasi-intentional, or erroneous. It is also immaterial as to what kind of weapons the bandits have used to commit the crime. The Shāfiʿī school maintains, however, that proof of intention to kill is required for imposition of the prescribed punishment but that the terroristic features of the crime of *ḥirābah* need no proof of intention as this is revealed by the show of force and striking of fear among people.[26]

Fresh reflection on the conditions and component elements that Muslim jurists have stipulated in their expositions of *ḥirābah* suggests that these are undoubtedly instructive, yet some changes may be required if one were to legislate on terrorism today. The view that allows the ruling authorities to determine the component elements of the crime merits attention as it not only bears harmony with the Qur'anic dispensations on the subject but can also accommodate the change of conditions in recent times. As already mentioned, terrorists nowadays often use remote control devices that may or may not involve the actual presence of the perpetrators at the crime scene. The terrorists may also use minor persons, as they often do, as suicide bombers. Certain other aspects of *ḥirābah* may also call for further reflection and review. It is of interest to note that the Qur'an determines the crime of *ḥirābah* by its consequences—terror, killing, injury, and plunder, without specifying further details. The Qur'an lays down the essential elements of the crime, which is perhaps sufficient for rulers and legislative authorities today to determine the component elements of *ḥirābah* (terrorism) in light of prevailing conditions.

Repentance in Ḥirābah

As for the attributes of repentance that suspend the capital punishment and its consequences, Muslim jurists have differed over details and held different views. Repentance in this crime means expression of regret and remorse for its commission and expressed determination not to commit it in the future. The Qur'an allows repentance only if it precedes subjugation of the offender by the authorities and not afterwards. It is suggested that even if the assailants surrender, they must still show that they have actually mended their ways, disarmed, and abandoned what they were doing, and only then can the prescribed *ḥadd* punishment be suspended. Fiqh

scholars have also differed as to the consequence of repentance: Does it suspend both God's Rights and the Right of Man, and if so, which takes precedence? In response, it is stated, in the Mālikī opinion, that repentance before arrest only suspends the capital punishment of *ḥirābah* and nothing else. All other claims in both categories remain unaffected. This means that the authorities may impose alternative punishments and the individuals affected also remain entitled to claim their rights in whatever way they may have been harmed, unless they grant forgiveness. The Shāfiʿī school maintains that the Right of Man takes priority: if homicide or bodily injury has been committed during a holdup, it must be tried first according to the relevant rules. This view has the support of other schools too in that the assailant is not exonerated for homicide and bodily injury due to repentance or surrender. If, however, the victims' relatives grant forgiveness or accept blood money, and the authorities also grant pardon, action may be suspended against the terrorist. An alternative view has it that repentance suspends both of the said categories of rights except for any property that may still exist, which must be returned. It would appear that the Imam and/or judicial authorities have residual jurisdiction in regard to determining the precise consequences of a genuine repentance and surrender.[27]

Suicide and Suicide Bombing

Historically, the first organised suicide attack in Islam was carried out by the Nizārī
Ismāʿīlīs, a Shii community who tried to establish an independent state. They initiated an open revolt against the Seljuq emirs and assassinated the prominent Saljūq vizier, Niẓām al-Mulk, in 485/1092.[28] Terrorism has largely been inconclusive and failed to achieve its desired purposes. The nineteenth and twentieth centuries saw large-scale terrorism practices by Russian anarchists and Bolshevik state terrorists. Later nationalist movements like the IRA, the Zionist Stern Gang, and Armenian Nationalists also indulged in terrorist practices. They all considered terrorism as the most cost-efficient and effective form of warfare for the poor, putting public pressure on governments to change their policies. In most cases, their terrorism was, however, counterproductive. "Virtually nowhere has terrorism produced the desired result. Rather in most cases, it has stiffened resistance and caused untold suffering to friends and foes alike."[29]

Contemporary suicide bombing that does not distinguish among political, military, and civilian targets has no precedent in Islamic law and

history. Suicide bombing has become a highly disturbing aspect of contemporary terrorism such that a decisive ruling and consensus on it would be necessary to curb it. Suicide (*intihār*) does occur in Islamic law, but not in the way twenty-first-century Muslims are experiencing it.

Suicide falls under the Qur'anic provision of "killing without just cause [*illā bi'l-ḥaqq*]" (al-Isrāʾ, 17:33), simply because a person does not have the right to take his own life. Under conventional fiqh, suicide is not subsumed by *ḥirābah* or terrorism—rather it is part of the general discussion of the right of life. That is the main context, but here it is treated next to *ḥirābah* as it has clearly become an aspect of contemporary terrorism.

Since life is a God-given gift, it may not be subjected to destruction and abuse even by oneself. This is why shariah forbids suicide without any exception. It is a heinous sin for which the perpetrator is liable, in the event of an unsuccessful attempt, to a deterrent penalty of *taʿzīr*. If the attempt succeeds, the person is still liable to an expiation (*kaffārah*), which may be taken from his property, according to the Shāfiʿīs and some Ḥanbalī jurists, whereas the Imams Abū Ḥanīfah and Mālik do not make expiation a requirement.[30] The Qur'anic authority on this is: "Kill yourselves not, for God is truly Merciful unto you" (al-Nisāʾ, 4:29).

وَلَا تَقْتُلُوٓاْ أَنفُسَكُمْۚ إِنَّ ٱللَّهَ كَانَ بِكُمْ رَحِيمًا.

Life is a trust (*amānah*) in the hands of its bearer, who is expected to safeguard and cherish it with responsibility and care. People who are driven to despair are advised to have faith in God's mercy as in the following verse:

> Say: O my servants who have transgressed their souls not to despair from God's mercy. For God forgives all sins. (al-Zumar, 39:53)

قُلْ يَـٰعِبَادِيَ ٱلَّذِينَ أَسْرَفُواْ عَلَىٰٓ أَنفُسِهِمْ لَا تَقْنَطُواْ مِن رَّحْمَةِ ٱللَّهِۚ إِنَّ ٱللَّهَ يَغْفِرُ ٱلذُّنُوبَ جَمِيعًاۚ إِنَّهُۥ هُوَ ٱلْغَفُورُ ٱلرَّحِيمُ

The prohibition of suicide by the clear text also means that anyone who facilitates or collaborates in the act of suicide is also liable to a deterrent punishment.[31]

Qur'an commentators and jurists have drawn the following conclusions from this verse (4:29):

- The obvious meaning is that suicide is forbidden. It is *ḥarām* for a person to kill himself. This is the obvious meaning of the text.

- It also means that "you may not kill one another." This is the interpretation of Ibn ʿAbbās, Saʿīd b. Jubayr, ʿIkrimah, Qatādah, and others.
- No one may do something nor take an assignment if it may cause his own death—even if it is in pursuit of a religious duty. This is the understanding of ʿAmr b. al-ʿĀṣ, who expressed it in the battle of Dhat al-Salasil— he prayed together with other Companions while he was impure (*junūb*) on a bitterly cold night. When he mentioned it to the Prophet, the Prophet said: You and your companions prayed while you were *junūb*! To this he replied, O Messenger of God, I had a wet dream in the night and feared I might be struck with perdition if I took a bath and I recited this verse. The Prophet, pbuh, laughed but did not say anything.
- No one should deprive himself of the essentials of life that may lead to his death.
- One may not indulge in self-destructive crimes and consumption of lethal substances.[32]

> According to a hadith report, a person [engaged in battle] killed himself with a broad-headed arrow. The Messenger of God said: As for me, I will not pray [funeral prayer] over him.[33]
>
> أخبرنا اسحق بن منصور قال أنبأنا أبو الوليد قال حدثنا أبو خيثمة زهير قال
> أن رجلا قتل نفسه بمشاقص فقال رسول الله صلى الله عليه وسلم أما أنا فلا أصلي عليه

The Prophet has strongly condemned suicide, as in the following hadith:

> The one who throws himself off a mountain cliff and kills himself will be doing the same to himself perpetually in Hell. The one who takes poison and kills himself shall be holding the same in his hand and permanently taking it in Hell, and the one who kills himself with a weapon will be piercing his body with it perpetually in Hell.[34]

A similar hadith proclaims that the "one who kills himself with something in this life will also be tortured by it in the fire of Hell."[35]

مَنْ قَتَلَ نَفْسَهُ بِشَيْءٍ عُذِّبَ بِهِ فِي نَارِ جَهَنَّمَ

Al-Bukhārī has recorded a long hadith to the effect that the Prophet looked at a man, in a battle against the pagans, and he was by all accounts one of the most capable of Muslim warriors. But the Prophet said concerning him:

He is from the people of the Hell. A man amongst the audience said: "I will accompany him." So he went along with him, and whenever he stopped he stopped with him, and whenever he hastened, he hastened with him. The [brave] man then got wounded severely, and seeking to die at once, he planted his sword into the ground and put its point against his chest in between his breasts, and then threw himself on it and committed suicide."[36]

فَقَالَ رَسُولُ اللّٰهِ صلى الله عليه وسلم أَمَا إِنَّهُ مِنْ أَهْلِ النَّارِ. فَقَالَ رَجُلٌ مِنَ الْقَوْمِ أَنَا صَاحِبُهُ. قَالَ فَخَرَجَ مَعَهُ كُلَّمَا وَقَفَ وَقَفَ مَعَهُ، وَإِذَا أَسْرَعَ أَسْرَعَ مَعَهُ ـ قَالَ ـ فَجُرِحَ الرَّجُلُ جُرْحًا شَدِيدًا، فَاسْتَعْجَلَ الْمَوْتَ، فَوَضَعَ سَيْفَهُ بِالْأَرْضِ وَذُبَابَهُ بَيْنَ ثَدْيَيْهِ، ثُمَّ تَحَامَلَ عَلَى سَيْفِهِ، فَقَتَلَ نَفْسَهُ.

Suicide bombing in our time is not addressed in the scholastic discourse, but it can find some historical connection with martyrdom, especially in the Shii tradition—in particular, the Shii narrative that developed following the death of the Prophet's grandson Ḥusayn in 680 CE. Ḥusayn and his followers did not choose martyrdom at the Battle of Karbala in the manner that is familiar of most other Islamic martyrs in that martyrs usually fought for a cause but did not choose to be martyrs as such. Nevertheless, Shii tradition embellishes his death with prophetic foreknowledge of the outcome. It also embodies the model of a woefully small force of believers arrayed against an overwhelming Umayyad army of "evildoers." As a result of his death, the role of martyrdom would forever serve as a basis for the distinction of Shiism, which also gave it the power to affect ideological change from within.

Furthermore, by couching their opposition to the ruling of the Umayyad caliphate as a protest against a false understanding of the faith, the nascent Shii community cast their martyrs as the "opposition" par excellence. As Farhad Khosrokhavar states in his study of suicide bombers: "The martyrdom of [Ḥusayn] provided an opportunity to denounce the usurpers so as to reestablish the true religion of [Muḥammad]."[37]

The Ismāʿīlī Assassins, a Shii offshoot of the eleventh and twelfth centuries, also represent an example of Muslims who identified themselves so differently from the ruling sect that violence and death became a desirable option for pursuing their collective goals. Responding to their oppression at the hands of Sunni caliphs, the Assassins refocused their allegiance on their sect rather than the more encompassing Islamic faith.

Fiqh manuals in mainstream Islam are silent on suicide bombing, which has a short history and drew public attention when Israel unleashed a new wave of aggression on street processions of Palestinian

youth (2000–2001). The upsurge ever since in suicide bombing by those claiming to be Islamic warriors has brought mixed responses from Muslim scholars. Most scholars of standing have not hesitated to condemn this and also the September 11, 2001 attacks as being contrary to Islamic principles.[38]

It is simplistic to lump together the Palestinian suicide bombings with al-Qaeda and ISIS terrorist activities, as few would deny the genuine suffering of the Palestinian people nor the legitimacy of their demand for a homeland and state. It is also simplistic to equate suicide bombing with martyrdom as many have claimed. This is because suicide bombing challenges two fundamental principles of Islam: the prohibition against suicide and the deliberate killing of noncombatants.

The Muslim warrior enters a battle, not with the intention of dying, but with the conviction that if he should die it would be for reasons beyond his control. Martyrdom does not begin with a suicidal intention, let alone the linkage of that intention with the killing of noncombatants, such as women and children. Suicide bombers intentionally set out to kill themselves and their victims, thus violating the norms of Islamic law and ethics.

Those who have raised the issue of "collateral damage" in this context are mistaken, because noncombatants are chosen as the direct target of suicide bombing. They are neither collateral nor incidental. Even if the cause of fighting the Israeli aggression is a valid one, that still does not justify killing noncombatants. What drives the bombers—often impressionable teenagers—on their suicidal missions are promises of a martyr's reward by the so-called religious scholars, who fuel the frustration and volatility of tender emotions with their misguided instructions.

Suicide bombing is a wider phenomenon, not always related to religion. Robert Pape, a political scientist who studied suicide terrorism from 1980 to 2001, points out that "religion is not the force behind suicide terrorism." He says, "The data shows that there is little connection between suicide terrorism and Islamic fundamentalism, or any religion for that matter," adding that the group responsible for the highest percentage (40 percent) of all suicide attacks has been the Tamil Tigers in Sri Lanka, who are adamantly opposed to religion. Rather, he suggests, nearly all suicide terrorist campaigns are "coherent political or military campaigns" whose common objectives are strategic, either to compel military forces to withdraw from their homeland or to bring down a regime they are opposed to—as in the case of Taliban suicidal missions in Afghanistan. Suicide bombing in the name of Islam is thus for the most part a "socio-political phenomenon,

not a theological one."[39] Since 2001 the motivation aspects of suicide have become even more diversified, as explained in the next section.

Terrorism Then and Now: A Survey of Contemporary Opinion and Research

Terrorism has been distinguished from an ordinary crime not only by reference to the nature of the harm caused but by terrorists' ideology. This partly explains why some criminal activities, such as a school shooting, were not labelled as terrorist attacks in the media, while others like the 2013 Boston marathon bombing were quickly reported as acts of terrorism.[40] Comparing contemporary terrorism with *ḥirābah*, there is a certain shift of context and motivation from the political to the religious: whereas *ḥirābah* was mainly politically motivated, the practitioners of contemporary terrorism have added a religious dimension as they are also motivated either in whole or in part by a religious imperative and consider violence as a divine duty or a sacramental act. Bruce Hoffman (1998) noted that religious terrorists differ from secular terrorists in motivation: whereas secular terrorists attempt to appeal to actual and potential sympathisers, religious terrorists appeal to no constituency other than themselves. For Audrey Cronin (2002), religious terrorists act "directly or indirectly to please the perceived commands of a deity." This is why, for Hoffman and Cronin, such distinguishing factors make religious terrorism more destructive in nature.[41]

It needs to be mentioned that ordinary criminal law functioned under the traditional principle that motive was not the defining element of a crime in that a political or religious motive could not excuse the commission of a crime. To maintain otherwise would be tantamount to undermining the integrity of the judicial process. If one were to accept the motive element, particularly a religious one, it could also provide the accused with a platform to influence the trial process by offering extensive evidence on his own interpretations and beliefs.[42]

In a book chapter titled "The Revolt of Islam 1700 to 1993," Nikkie Keddie, an American professor of Middle Eastern history, explains the rise of militancy among Muslims. She notes that with the curious exception of Wahhabism, militant jihad movements in the modern era began and grew mostly as a response to Western colonialism. The earliest ones in the eighteenth century in Sumatra and West Africa emerged in the face of

"disruptive economic change influenced by the West." In the nineteenth century, broader waves of jihad movements cropped up in Algeria, Sudan, the Caucasus, and Libya as "a direct response to French, British, Russian and Italian colonial conquest."[43]

At a press interview bearing the title "There Is Nothing in Islam That Is More Violent Than Christianity,"[44] Karen Armstrong replied to a question on the causes of Muslim terrorism by referring to "a more violent way" the West has taken toward Muslims. The West imposed their own concepts of modernity, democracy, and secularism on the Muslim world through colonial subjugation. "There was no self-determination. In Egypt there were 17 general elections between 1922 and 1952—all won by the Wafd Party, which was only allowed by the British to rule five times. Democracy was a bad joke." Secularism was introduced by these army officers with great violence. The Muslim clergy had their stipends confiscated, they were shot down, and they were tortured to death. The shah shot a hundred unarmed demonstrators in a holy shrine because they didn't want to wear Western clothes. And those in the West have consistently supported rulers like Saddam Hussein who denied their people any freedom of expression. All this has helped to push Muslims into violence. "When people are attacked, they invariably become extreme." But only a tiny proportion of Muslims actually agree with terrorism: 93 percent answered "no" to the question in the Gallup poll whether the 9/11 attacks were justified. And the reasons they gave were entirely religious. Of the 7 percent who said "yes," the reasons they gave were entirely political. Paul Hedges, a Singapore-based scholar of interreligious studies, commented that groups such as ISIS have grown, simply due to a power vacuum "created by the havoc caused by military interventions in the Middle East which have not been properly thought through nor followed up."[45]

In response to another question whether the terrorists are traumatised, Armstrong said that "some of them are, and some of them are plain wicked. Osama bin Laden was a plain criminal. But there is also great fear and despair among them. There have been surveys done by forensic psychiatrists who interviewed people convicted of terrorism since 9/11. They interviewed hundreds of people in Guantanamo and other prisons. And one forensic psychiatrist, who was also an officer of the Central Intelligence Agency (CIA), concluded that Islam had nothing to do with it. The problem was rather ignorance of Islam. Had they had a proper Muslim education, he said, they wouldn't be doing this. Only 20 percent of the prisoners had a regular Muslim upbringing. The rest were either new converts—like the

gunmen who attacked the Canadian Parliament—or nonobservant, which means they don't go to the mosque (like the bombers of the Boston marathon). Similarly, there is the case of two young men, both twenty-two, who before leaving Britain to join the jihad in Syria ordered from Amazon copies of *Islam for Dummies* and *The Koran for Dummies*. That explains their ignorance of Islam. Furthermore, tedium in societies must be taken seriously. There are some who are ridden with misery and a sense of no hope: "Misery, oppression and injustice—great injustice and we are still unjust." Look at the founding fathers of the United States who said that all men are created equal: they had no problem owning African slaves! "Liberty was only for Europeans. And it still is like that, because of the greed for oil. We give huge support to the Saudis, who give their people no human rights."

American political scientist Steven Fish in his book titled *Are Muslims Distinctive?* finds no evidence that countries with a larger share of Muslims experience disproportionate acts of mass political violence. He notes, in fact, as Saleena Saleem mentions in her review of his book, that when it comes to violent crimes such as murder, Muslim-majority countries have consistently low rates compared with Christian-majority countries. Such facts get lost when the focus is on the Muslim extremists who commit the majority of violent political and terrorist acts on a global scale. As for the role of religion, it is further noted that violent upheavals in the Middle East are driven by regional political interests rather than religion.[46]

Regarding the young French jihadists, Fareed Zakaria observed that most of the young jihadists in Europe have no background in political activism (say, Palestine), fundamentalist Islam, or social conservatism. Quoting the French Islamic scholar Olivier Roy in support, Zakaria states that radicalisation in France arises around the fantasy of heroism, violence, and death, not of *shahādah* and utopia. Abdelhamid Abaaoud, the ringleader of the Paris attacks, regularly used drugs and drank alcohol, as did many of his comrades-in-arms. Today the decision to join Daesh is usually sudden and impulsive. Daesh is the ultimate gang, celebrating violence for its own sake. These young men—and some women—are usually second-generation Europeans. They are often revolting against their more traditional, devout immigrant parents.[47] These people are unsure of their identity, rooted in neither the old country nor the new, and often face discrimination and exclusion. And in this context they choose a life of rebellion, crime, and then the ultimate adventure, jihad.

These circumstances also explain why Belgian Muslims make up a disproportionate share of Daesh volunteers. Fifteen percent of native-born Belgians live below the poverty line, compared with the staggering half of Belgians with a Moroccan background. In addition, Belgium has a particularly poor record of assimilation because it has its own crisis of identity, torn between two cultures, Flemish and Walloon. All of this tends to paint a picture of a new kind of terrorist, one who is less drawn into terrorism through religion but has chosen the path of terror as the ultimate act of rebellion. Radical Islam holds an appeal and is easily available through the internet and social media. This still does not absolve Muslims from the challenge to eradicate the cancer of radical Islam in their midst. As for Western law enforcement, it also suggests that bugging mosques and patrolling Muslim community centres might be focusing attention in the wrong direction. The real terrorists might instead be in bars, drug alleys, unemployment lines, and prisons getting radicalised before they get Islamised.[48]

Terrorism has evidently become more diverse and has developed in new directions. Looking at the regional and geographical manifestations of terrorism, Azhari Karim, a former Malaysian diplomat explains: "Whereas al-Qaeda, and more recently the IS group, are seen to be accountable for much of the terrorist attacks in Europe (Paris, Nice and Brussels) and the United States (San Bernardino and Orlando), the majority of incidents seem to have been by individuals who acted alone."[49] However, in the crescent states of the Middle East stretching from Libya, Tunisia, Egypt, Sudan, and Somalia, and on to Afghanistan, Pakistan, Yemen, Iraq, Turkey, Syria, and Saudi Arabia, groups such as al-Qaeda, the Taliban, Houthis, and Nusrah al-Qudra have fought wars with the local authorities. They have been supported in part by ISIS as a means of settling old scores with corrupt government officials and states that are seen as overly dependent on the West for their survival. Elsewhere there are different clones of such radicalised and irredentist movements in the Ukraine (pro-Russians), China (Uighurs), Nigeria (Boko Haram), and also in parts of South America (e.g., Colombia, Peru, and Brazil). Their aims have centred on the need for change and transformation of the economy with development and social progress being at the top of the agenda. Things are not the same in Israeli-occupied Palestine and in the countries of South and Southeast Asia. Some have resorted to violence to draw attention to their local "nationalist" problems. Others, mainly in Southern Thailand (Patani United Liberation Organisation [PULO]) and the Philippines (Abu

Sayyaf), are involved in struggles that are mainly motivated by autonomy and self-rule.

Only in the triangle of countries such as Malaysia, the Philippines, and Indonesia do we note groups akin to ISIS or al-Qaeda, whose sole purpose is to bring in a new "Islamic Order" or the "New Caliphate." Groups, such as the Jemaah Islamiyyah, al-Mauunah, and Abu Sayyaf have not only resorted to kidnapping and ransom-taking but also to inflicting gross violence in their acts and reprisals against local governments and populations.[50]

Muslims certainly need to create a positive image and an inspiring narrative that show how Islam is compatible with life in pluralistic societies. They should help combat the militant interpretations of Islam that endorse violent terrorism as jihad, which violates centuries of tradition.

At a speech in Sharjah in the United Arab Emirates, the young Nobel Prize winner, Malala Yusafzai, urged the world's Muslims to "come together...and join hands in the struggle for peace." She added: "we cannot talk about investing in our future without calling for an end to these bombings and these attacks." One must not forget that the majority of those suffering because of these conflicts and wars are Muslims, she added.[51]

Radicalisation by external forces has been identified as a principal means of recruitment of the region's youth and Islamic faithful. These influences could stem from "returnees" from the battlefronts in Iraq and Syria or from various ISIS-based social media postings. Another new development and source may be the 2016 U.S. presidential election campaign, especially that of the Republican nominee and now president, Donald Trump. He made immigration, especially of Muslims from the Middle East, a campaign topic emblematic of a policy to disallow Muslims completely from entering the United States. Democratic presidential nominee, Hillary Clinton, also discussed setting in place extensive screening methods on Muslims entering the United States. Events such as these were seen as providing terrorist groups with additional armour to intensify their nefarious methods to win over new, impressionable Muslim youth and others to their side. Trump's rhetoric about Muslims being a threat to the United States "play into the fears of citizens in the US and many Western nations, stoked by mainly right-wing media outlets spreading accusations and scare-mongering about Islam, immigration and jihad. It also plays into the perception of Muslims around the world who see themselves as abused and on the defensive against Western aggression."[52]

One more addition to an already confused scenario were the waves of mass migration of Muslims to Germany, Scandinavian countries, the United Kingdom, and other European destinations in 2015 and 2016. As large numbers of young migrants from wartorn Syria, Iraq, and Afghanistan entered Europe, there was a rise in crime and terrorist attacks, such as the July 14, 2016 Nice truck attack in France that killed eighty-six people, as well as lesser incidents in Germany and Belgium that alarmed the host countries about the possibility of even worse occurrences. Peter Apps thus commented that "it became increasingly less relevant whether an attack—such as the gun attack in Munich which killed nine, or the stabbing of an orthodox Jew in France, or a machete attack on a bus in Brussels is directly related to a militant group like ISIS or not "provided a migrant or someone of migrant descent is involved, it all falls into the same divisive narrative."[53] In many ways, what happened on the beach at Nice is exactly what groups like ISIS want: to deepen divisions within society.

Dealing with terrorists also pose legal challenges. Practices differ in different countries. In France, one could not detain a terrorist suspect unless one was caught in the act or had strong evidence. In the United States a suspect could be detained on the basis of evidence received from other countries. The problem revolves around security and human rights issues. Admittedly, countries can devise their own approaches, and many countries have, in fact, proposed or passed new antiterrorism laws according to their own needs and realities.

Muslim Responses to Global Terrorism

The upsurge in suicide bombing by those claiming to be "Islamic warriors" has brought mixed responses from Muslim scholars. Most scholars of standing have not hesitated to condemn this and also the September 11, 2001 attacks as being contrary to Islamic principles.

In its sixteenth session (5–10 January 2002), the Jeddah-based Islamic Fiqh Academy, affiliated with the Organisation of Islamic Conference (OIC; now known as the Cooperation), condemned all forms of terrorism as follows:

> Terrorism is an outrageous attack carried out either by individuals, groups, or states against human beings. It includes all forms of intimidation, harm, threats, killing without a just cause, all forms of armed robbery, banditry, every act of violence or threat intended to

> fulfil a criminal scheme individually or collectively, terrify and horrify people by hurting them or by exposing their lives, liberty and security, to danger. It can also take the form of inflicting damage on the environment, a public or private utility—all of which are resolutely forbidden in Islam.[54]

Muslim religious and political notables expressed unqualified condemnation of the ISIS and Charlie Hebdo atrocities. International organisations and fatwa councils, including the Majlis Ulama Indonesia, the National Fatwa Committee of Malaysia, and the Mufti of Saudi Arabia, denounced the brutality and violence of the ISIS group as violating the core principles of Islam.

In September 2003 the then former (and now incumbent) Malaysian prime minister, Dr. Mahathir, denounced Palestinian suicide bombing and said that suicide bombing was unacceptable in Islam. He added that they resorted to suicide bombing because they did not have proper weapons in their fight for an independent homeland. He stated, "Nevertheless, it is wrong to commit suicide bombing because it causes loss of innocent lives. Fighting is one thing, but if you go on board a school bus and kill all the school children, I don't think it is a brave move."[55]

In November 2003, the Arab states condemned the suicide car bombing in Riyadh that killed seventeen and wounded more than a hundred, mainly Arabs. The twenty-two-member Arab League denounced the attack as "terrorist and criminal," while Saudi Arabia and its five neighbours in the Gulf Cooperation Council condemned it as "cowardly and terrorist." The Arab League secretary-general, Amar Musa, also said such acts "only aim to destabilise . . . terrify and kill" innocent people.[56]

Abusive interpretations of jihad notwithstanding, jihad is also an instrument of peaceful self-education and improvement. The pathways to peace in Islam are also enriched by its teachings on human fraternity, compassion, honouring one's neighbour, avoidance of harm to others, and the rich tradition of Sufism. Islam also advocates peace through nonviolence, universalism, and a generally positive view of human nature and potential.

Maḥmūd Shaltūt, the Shaykh of al-Azhar University (1958–1963), lent considerable weight to the argument that the Qur'an only allows warfare to be waged in self-defence. He quotes verses from the Qur'an, including al-Anfāl (8:61) and Mumtaḥanah (60:8–9), which together with al-Baqarah (2:190) and al-Ḥajj (22:39–40) uphold and substantiate that principle.[57]

The mufti of Saudi Arabia, ʿAbd al-Azīz al-Shaykh, declared that suicide bombings have never been an accepted method of fighting in Islam. "To my knowledge so-called 'suicide missions' do not have any legal basis in Islam and do not constitute a form of Jihad. I fear that they are nothing but a form of suicide, and suicide is also prohibited in Islam." This echoes an earlier fatwa by his predecessor, the late Saudi mufti Shaykh ʿAbd al-Azīz b. Bāz.

Shaykh Yūsuf al-Qaraḍāwī issued a fatwa condemning the tragic suicide attacks of 9-11, stating:

> "Even in times of war, Muslims are not allowed to kill anybody save the one who is engaged in face-to-face confrontation with them." He added that they are not allowed to kill women, old persons, or children, and that haphazard killing is totally forbidden in Islam. Shaykh al-Qaraḍāwī on another occasion defined terrorism as "the killing of innocent people...with no differentiation between the innocent and the foe."

Al-Azhar's Research Academy, shortly after September 11, declared that a "Muslim should only fight those who fight him; children, women and the elderly must be spared." Therefore, terrorism and its crimes against civilians are impermissible under any interpretation of Islamic law. This ruling does not change based on geographical locality.[58]

Another Shaykh of al-Azhar, Muḥammad Sayyid Ṭanṭāwī, issued a fatwa in 2001 to condemn the hostage-taking in the Philippines: "Islam rejects all forms violence. These acts of violence have nothing to do with Islam."[59] He also condemned the terrorist act of September 11, 2001, in America.[60] The Chief Mufti of Saudi Arabia, ʿAbd al-Azīz b. ʿAbd Allāh al-Shaykh, also declared in 2004:

> You must know Islam's firm position against all these terrible crimes. The world must know that Islam is a religion of peace, justice and guidance....Islam forbids the highjacking of airplanes, ships and other means of transport, and it forbids all acts that undermine the security of the innocent.[61]

The Washington-based Fiqh Council of North America (FCNA) issued the following fatwa and press release on July 29, 2005:

> Islam strictly condemns religious extremism and the use of violence against innocent lives. There is no justification in Islam for extremism or terrorism. Targeting civilians' life and property through suicide bombings or any other method of attack is *ḥarām* —forbidden—and those who commit these barbaric acts are criminals, not "martyrs."...We clearly and strongly state: 1) All acts of terrorism targeting civilians are *ḥarām*. 2) It is *ḥarām* for a Muslim to cooperate with any individual or group that is involved in any act of terrorism or violence. 3) It is the civic and religious duty of Muslims to cooperate with law enforcement authorities to protect the lives of all civilians.[62]

On 18 April 1983, the Lebanese Shii organisation Islamic Jihad (the precursor of Hezbollah) carried out suicide attacks on the US embassy in West Beirut, killing sixty-three staff members.[63] On 23 October the same year, the headquarters of the US and French forces in Beirut were attacked by suicide bombers, resulting in the death of 298 military men and women. According to Saad Ghorayeb, these suicide attacks took place because Khomeini, the supreme Shii leader, authorised them. The "martyrs," as he termed them, at the US Marines compound "saw nothing before them but God, and they defeated Israel and America for God. It was the Imam of the Nation [Khomeini] who showed them this path and instilled this spirit in them."[64]

The leading figure among the Lebanese Shii community, Sayyid Muḥammad Ḥusayn Faḍlallāh, initially denied that he supported these attacks, but eventually he offered his endorsement. He argued that, in the absence of any other alternative, unconventional methods became admissible and perhaps even necessary. On the other hand, Faḍlallāh was one of the first high-ranking Shii scholars publicly to condemn the September 11 attacks, probably the most horrific example of suicide attacks.

On 25 February 1994, Baruch Goldstein, a Jewish settler, massacred twenty-nine Muslim worshippers during *fajr* (dawn) congregational prayer in a Hebron mosque. In response, the Islamic resistance movement Hamas introduced suicide attacks into its conflict with Israel and started to strike at Israel's heartland. The suicide attack on 13 April 1994 at the central bus station in Hadera was probably the first such attack by Hamas. Ramadhan Shellah, a leader of Islamic Jihad in the Occupied Territories, acknowledged that the tactic had been taken over from the

Lebanese Hezbollah. In an interview given to *al-Hayat* newspaper on 7 January 2003, he was asked whether the organisation had borrowed the idea of "martyrdom operations" from Hezbollah. "Of course," he said.[65] Muhammad Munir, who has discussed Faḍlallāh's views, says that he does not distinguish between suicide attacks by combatants (not pretending to be civilians) of either side during an ongoing war and those against military objectives or civilians and civilian objects. Munir then draws his main conclusion as follows: When a suicide bomber targets civilians, he might be committing at least five crimes, according to Islamic law, namely killing civilians, mutilating them by blowing them up, killing enemy civilians, committing suicide, and, finally, destroying civilian objects or property. In his opinion, Munir said, because of the crimes committed, he—or she—is not a *shahīd* (martyr). Those who call such a person *shahīd* are simply ignoring the teachings of the Qur'an and the Sunnah with regard to the Islamic jus in bello and are making a mockery of God's law.[66]

Unless the root causes of radical extremism are addressed, many have warned that incidents of violent extremism is likely to increase. Once a radical group falls by the wayside, is discredited, or is made irrelevant, another group emerges, which is often even more radical and violent. This is how ISIS is a successor to al-Qaeda—upping the stake in the radicalisation contest and becoming even more destructive and violent than its predecessor.[67] Unless the legitimate claims of those who suffer from oppression and injustice are heard, angry and disillusioned men and women—whether Sunni, Shia, Kurds, Palestinians, or others— often feel that the path of violence is the only one left for them to take.[68]

In 2012 Mark Winer wrote, in an article titled "Fundamentalists versus Moderates," that the future of humanity may well depend on the ability of religious moderates to overcome their extremist coreligionists. Extremism, he argued, only spawns interfaith bigotry while sanctioning violence, war, and terrorism. A great deal therefore depends on our understanding of the eternal conflict between extremism and moderation and on the strategies devised by religious moderates to combat this common scourge. [69]

It is indicative of the wisdom of the early Muslims that they labelled a group that behaved similarly to modern-day terrorists the "Kharijites" (from *Khawārij*, lit., outsiders). By this name they made it known that the group had exited from the mainstream community, thereby giving them the choice of either changing their behaviour and rejoining the community or else staying as outsiders. The same can be said of *ghulāt* (lit.,

exaggerators), the name so unmistakably expressive of its purpose, which was given to a small group of Shia who exaggerated their interpretation of the doctrine of imamate so as to elevate the first Shii Imam, ʿAlī b. Abī Ṭālib, to a deity.

One can hardly think that anyone could soil Islam's name as badly as the likes of ISIS, Boko Haram, and al-Shabab have done. If the militants should even realise this—that they are doing more harm than good in the cause of their religion, as Islamic leaders all over the world are already pointing out—their numbers will eventually diminish.[70]

Ḥirābah *in the Qur'an Revisited*

The Qur'anic phrase "waging war on God and His Messenger" put the Muslim jurists in a certain quandary as to its precise import and implications. For it is a generic expression evidently not meant to be taken for its literal meaning, but since it is immediately followed by "making mischief in the land [*fasād fī'l-arḍ*]," the two phrases were read together in order to provide a clearer understanding of the verse. Yet this latter phrase too is less than specific, for *fasād fī'l-arḍ* can also include a variety of criminal activities and transgressions. It is even suggested that the latter phrase is wider than the former in that spreading "corruption in the earth" can include criminal activities that may not even qualify as *ḥirābah* or "waging war" as such. Hence the relationship between the two phrases is seen as one of the specific (*khāṣṣ*) to the general (*ʿām*). *Ḥirābah* is thus seen as only one of the many manifestations of *fasād fī'l-arḍ*. Al-Shawkānī (d. ca. 1255/1839) wrote that the manifest meaning of *fasād fī'l-arḍ* is broad enough to subsume not only highway robbery but also propagation of false deities (*shirk*); destruction of peoples' lives; looting their properties; attacking their dignity; destruction of trees, waterways, and livestock; and aggressive dictatorships that humiliate people.[71] Some commentators also included under *ḥirābah* recidivist thieves, notorious rapists, and homosexuals whose evil and mischief-making cannot be stopped in any way other than execution. Most however understood the verse under review to be referring to bandits and those who stage armed rebellions with a show of force that threaten peace and order in society. Ibn Ḥazm al-Ẓāhirī (d. 456/1064) observed that, since many other crimes such as adultery and theft were specifically mentioned in the Qur'an and that the text had also assigned quantified penalties for them, what was left unspecified was the crime of banditry (*qaṭʿ al-ṭarīq*). The verse of *ḥirābah* was thus understood

to have contemplated it. Yet to read that particular theme into the meaning of *ḥirābah* and "spreading of corruption in the earth" was evidently by way of interpretation that in due course found common acceptance. In sum, unlike the other *ḥudūd* crimes that are mentioned specifically by name, *ḥirābah* (banditry) is arrived at through juristic construction and general consensus (*ijmāʿ*).[72]

It is not only natural but necessary for Muslim scholars and jurists of all persuasions to continue this interpretative endeavour by subsuming the global menace of contemporary terrorism under the umbrella of the Qur'anic concept of "waging war against God and His Messenger" and indeed as one of the greatest instances of spreading corruption in the earth humanity has known. This understanding of *ḥirābah* is clear from reading the text without recourse even to any methodology or formula of reasoning, such as analogy (*qiyās*) or *ijtihād*. Muslim jurists have commonly understood "waging war against God and His Messenger" as to mean waging war on the people, including, of course, the Muslim community. This is clear enough. Juristic thought in the fiqh sources has focused on a variety of related themes, raising such questions, as already reviewed, as to whether *ḥirābah* can be committed by an individual or if it is a collective crime that only a group can commit; whether it can be committed within or only outside city areas; whether or not it must involve the use of weapons; and whether or not it is politically motivated. Most of these questions, or perhaps some of them, are also relevant to contemporary terrorism, but the availability of remote-control devices and a host of other modern methods of destruction that the terrorists have utilised, as well as the ever-expanding scope of contemporary terrorism, have made some aspects of the fiqh specifications of *ḥirābah* almost totally redundant. Certain manifestations of contemporary terrorism, such as suicide bombing, were also not familiar to the earlier schools and scholars and tend to fall outside of the scope of their writings. That said, one also finds that the fiqh literature on *ḥirābah* is internally diverse; much of it is not supported by general consensus (*ijmāʿ*) and thus remains open to further development and *ijtihād* in light of the pressing needs and common good (*maṣlaḥah*) of the people.

According to some early commentators, the verse of *ḥirābah* contemplated Muslim rebels and mutineers only since repentance is normally not accepted from unbelievers until they embrace Islam. But the majority of jurists have disputed this and maintain that *ḥirābah* as addressed by the Qur'an is not confined to Muslims and may be committed by anyone,

Muslim or non-Muslim, provided that the crime is committed in a territory that is ruled by a Muslim government.[73]

Furthermore, it is worth mentioning that "spreading of mischief/corruption in the earth" is a major theme of the Qur'an and occurs in a variety of other contexts. Included under *fasād fi'l-arḍ* are thus the spreading of heresies (al-Baqarah, 2:11–12); destruction of the living environment (al-Rum, 30:41); destruction of farmland, gardens, and waterways (al-Shuʿarāʾ, 26:141); persistent criminality (al-Māʾidah, 5:32); inciting enmity and hatred among people (5:64); the practice and spreading of sorcery (Yūnus, 10:79); humiliating people through pharaonic absolutism (al-Qaṣaṣ, 28:4); practice and incitement to sodomy and homosexuality (al-ʿAnkabūt, 29:28); killing and brutalising innocent people (2:30); and persistent hypocrisy (2:204). The Qur'anic conception of "spreading corruption in the earth" is indeed comprehensive and clearly strikes a note with almost all the various manifestations of contemporary terrorism.

Having reviewed the Qur'anic passages on *fasād fi'l-arḍ*, al-Khaṭṭāf observes, and rightly so, that the concept is broad enough to subsume such other criminal activities experienced in our time such as drug trafficking, human trafficking, Mafia-like crime syndicates, and loan sharks. These criminals kidnap people and destroy and brutalise them and their families, as well as those who stage armed rebellions and military coups that topple lawfully elected governments. To quote al-Khaṭṭāf:

> This is why *ḥirābah* acquires enormous significance in our lives today, especially after what we witnessed in the Arab region through the so-called Arab Spring; the inciters to violence and war that invaded peoples' lives and properties, wreaked havoc on them and the lives of entire communities and their homelands. . . .The Qur'anic concept of "spreading mischief in the earth" also includes the agents of corruption who shake the constitutional order, play with people's lives and collude with enemies to carry out their sinister designs.[74]

The strong textual grounding of *ḥirābah* and its wide-ranging implications can hardly be underestimated in view especially of the global reaches of terrorism and emergence of terrorist organisations and networks. People need to be protected and laws need to be revised to equip law enforcement agencies and governments against them. The world has witnessed horrendous atrocities in so many places, including crimes committed by

warlords, drug barons, and mischief-makers in places such as wartorn Syria, Iraq, Afghanistan, Nigeria, and Somalia. Included in these are, of course, those who terrorise innocent people, committing genocide and crimes against humanity in the name of a caliphate or any other name. These are the enemies of Islam and peace, the destroyers of people's lives, who are not entitled to use Islam's name in association with their heinous crimes. There is absolutely no room for atrocity and the shedding of innocent blood in shariah by anyone, including ISIS, al-Qaeda, the Taliban, al-Shabab, Boko Haram, and the like. Both the means and the ends must be lawful, for shariah proscribes a pursuit of lawful ends through unlawful means. Justice must be served, and truth uncovered and told, through approved processes and means, as far as possible, or amnesty granted in the hope for a peaceful end to hostilities except for the criminals who have committed atrocities. Only then can one nurture a realistic prospect of a peaceful future for the affected individuals and communities.

VIII

Issues over Apostasy (Riddah)

THERE ARE BASICALLY three issues that Muslim commentators have highlighted concerning the treatment of apostasy in scholastic jurisprudence and also the manner of its occurrence in contemporary legal instruments, such as that of the Hudud Bills of Kelantan and Terengganu in Malaysia. One of these is over the definition of apostasy, which is so general as to be lacking in focus. Unless apostasy is given a clear definition, it is likely to conflict with both the Qur'anic position as well as many of the applied constitutions of Muslim countries on freedom of religion. The Hudud Bill of Kelantan 1993 defines apostasy very much in line with how it is done in the fiqh manuals:

> Apostasy (*irtidād*) is any act done or any word uttered by a Muslim who is *mukallaf* (legally competent), being an act or word which according to Shariah law affects or which is against the *ʿaqīdah* (belief) in Islamic religion. (Sec. 23.1)

The bill goes on to specify that the act or word in question must be voluntary and that there must be no compulsion. It is further provided that the act or word affecting the belief (*ʿaqīdah*) must be such that they concern "the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim...pertaining to the Rukun (pillar or fundamental of) Islam, Rukun Iman (fundamentals of dogma), and matters of halal (the allowable or the lawful) or *ḥarām* (the prohibited or the unlawful)" (Sec. 23.2). These expressions are still too broad and have come under scrutiny because they often fall short of offering a clear and exclusive definition. There is also nothing in these provisions, or anywhere else in the Hudud Bill of Kelantan, to draw a distinction between

apostasy and blasphemy. This definition is also broad enough to lump together a variety of different concepts: blasphemy, apostasy, disbelief (*kufr*), and heresy (*bidʿah*). The sum total of this approach would be that there will be no difference, for the purposes of enforcing the death punishment under this bill, between a simple conversion that is neither contemptuous nor hostile and one that inflames the masses of Muslims and is capable of causing bloodshed and civil strife. The Hudud Bill of Kelantan provides that anyone found guilty of committing the offence shall be given three days in which to repent, failing which "the court shall pronounce the death sentence on him and order the forfeiture of his property . . . for the Baitul-Mal" (Sec. 23.4).

What is striking about the Hudud Bill of Kelantan is an unmediated rendering of the traditional fiqh text materials on apostasy. What follows next is a review of the source evidence in the Qur'an and hadith as well as some of the early and more recent scholarly contributions on the subject, concluding with our own assessment.

Review of the Source Evidence on Apostasy

The leading schools of Islamic law, both Sunni and Shia, have adopted as standard law the ruling of the hadith that provides that one "who changes his religion shall be killed" [من بدل دينه فاقتلوه]). But the issue of death as a punishment for apostasy is controversial as the Qur'an is totally silent on the subject,[1] and on the contrary provides that "there shall be no compulsion in religion" (al-Baqarah, 2:256). This basic Qur'anic position is further endorsed in a number of other verses, such as the following:

> Those who accept the faith and then disbelieve, then accept the faith again and disbelieve again, and go on increasing in disbelief, God will not forgive them nor guide them on the [right] path. (al-Nisāʾ, 4:137)

إِنَّ ٱلَّذِينَ ءَامَنُواْ ثُمَّ كَفَرُواْ ثُمَّ ءَامَنُواْ ثُمَّ كَفَرُواْ ثُمَّ ٱزۡدَادُواْ كُفۡرٗا لَّمۡ يَكُنِ ٱللَّهُ لِيَغۡفِرَ لَهُمۡ وَلَا لِيَهۡدِيَهُمۡ سَبِيلَۢا

> If God had willed, everyone on the face of the earth would have been believers. Are you then [O Muḥammad] compelling the people to become believers? (Yūnus, 10:99)

وَلَوۡ شَآءَ رَبُّكَ لَأٓمَنَ مَن فِي ٱلۡأَرۡضِ كُلُّهُمۡ جَمِيعًاۚ أَفَأَنتَ تُكۡرِهُ ٱلنَّاسَ حَتَّىٰ يَكُونُواْ مُؤۡمِنِينَ .

> Say, the Truth [has come] from your Lord. Let him who will, believe, and let him who will, disbelieve. (al-Kahf, 18:29)

وَقُلِ ٱلۡحَقُّ مِن رَّبِّكُمۡۖ فَمَن شَآءَ فَلۡيُؤۡمِن وَمَن شَآءَ فَلۡيَكۡفُرۡۚ

> Unto you your religion, and unto me my religion. (al-Kāfirūn, 109:6)

لَكُمۡ دِينُكُمۡ وَلِيَ دِينِ

The Qur'an evidently maintains that faith must be sustained through conviction and that religion induced by compulsion is meaningless.

The second issue to raise, and one that many jurists have also discussed, is over reducing the element of repentance (*tawbah*) in apostasy to little more than a technical formality. Scholastic jurisprudence is affirmative on offering the apostate an option to repent and return to Islam but he must do so in three days; failing that, he will be liable to the death punishment.

The third issue is concerned with the total neglect in mainstream fiqh scholarship, and also more recent laws, of a body of opinion among the ulama that has been known to exist ever since the early days of Islam: The view that apostasy is not a *ḥudūd* but a *taʿzīr* offence. This view is based on the fact that the death punishment for apostasy is not mentioned in the Qur'an. Similarly, the hadith that provided the sole authority for the death punishment for the apostate is open to interpretation. The main hadith on this states that "whoever changes his religion shall be killed," a text that needs to be interpreted as it would otherwise cause confusion. For instance, would it be right to say that a Jew who converts to Islam or a Hindu who becomes Christian should be liable to the death punishment? This would evidently distort the message of the hadith—hence the need for its interpretation.

According to the rules of interpretation, as are expounded in *uṣūl al-fiqh*, once the general meaning of a decisive (*qaṭʿī*) text has been specified in some respect, the part that remains unspecified becomes speculative (*ẓannī*) and, as such, is open to further interpretation.[2]

This analysis is sustained by another hadith, which is often quoted in support of the death punishment for apostasy:

> The blood of a Muslim who professes that there is no god but God and that I am His Messenger is sacrosanct except in three cases: a married adulterer, a person who has killed another human being,

> and a person who has abandoned his religion, while splitting himself off from the community .[3]

قَالَ رَسُولُ اللَّهِ صلى الله عليه و سلم "لَا يَحِلُّ دَمُ امْرِئٍ مُسْلِمٍ يشهد أن لا إله إلا الله، وأني رسول الله إِلَّا بِإِحْدَى ثَلَاثٍ: الثَّيِّبُ الزَّانِي، وَالنَّفْسُ بِالنَّفْسِ، وَالتَّارِكُ لِدِينِهِ الْمُفَارِقُ لِلْجَمَاعَةِ

The apostate is thus one who boycotts the community (*mufāriq li'l-jamāʿah*) and challenges its legitimate leadership. This is where the death punishment may be invoked.[4]

There were cases during the time of the Prophet when certain individuals apostatised after professing Islam, yet the Prophet did not penalise them let alone condemn them to death. Affirmative evidence on this point is found in the following hadith, which is recorded in both al-Bukhārī and Muslim texts:

> A Bedouin came to the Prophet, peace be on him, and pledged his allegiance to him. The next day he came back, ill with fever and said repeatedly: "Return my pledge to me," but the Prophet refused—thrice. Then the Prophet said: Medina is like the bellows which rejects its dross and retains that which is pure.[5]

فَجَاءَ الأَعْرَابِيُّ إِلَى رَسُولِ اللَّهِ صلى الله عليه وسلم فَقَالَ يَا رَسُولَ اللَّهِ أَقِلْنِي بَيْعَتِي . فَأَبَى ثُمَّ جَاءَهُ فَقَالَ أَقِلْنِي بَيْعَتِي. فَأَبَى فَخَرَجَ الأَعْرَابِيُّ فَقَالَ رَسُولُ اللَّهِ صلى الله عليه وسلم " إِنَّمَا الْمَدِينَةُ كَالْكِيرِ تَنْفِي خَبَثَهَا وَتَنْصَعُ طَيِّبَهَا.

This was a clear case of apostasy, in which the Prophet made no reference to any punishment at all, and the Bedouin, despite his persistent renunciation of Islam, was let go unharmed. The Prophet even intimated that the person was like those in Medina who would have been thrown out—not quite an expression of resistance but still taking stock of the relevant situation. The purport of this hadith also harmonizes with the Qur'anic text (4:137—the first of the four passages previously quoted), which clearly provides a strong argument against the death penalty for apostasy.

The implication (of the verse 4:137) is unmistakable in that the initial reference to belief and then disbelief is followed by further confirmation of disbelief and then an "increase in disbelief." One might be inclined to think that if the first instance of apostasy did not qualify for capital punishment, the repeated apostasy might have provoked it—had such a punishment ever been intended in the Qur'an.

As for the hadith on the death punishment for apostasy (quoted in the preceding section), it is conveyed in the form of a general provision (*ʿām*), which is in need of specification (*takhṣīṣ*). The general purport of this hadith, as al-Shawkānī stated, has even been specified, at least in one respect, in the Qur'an itself (al-Naḥl, 16:106) with regards particularly to a person who changes his religion outwardly under duress but remains faithful otherwise. Such a person is exonerated and may not be subjected to any punishment. The Ḥanafīs and Shia Imamiyyah have also specified the general purport of this hadith with respect of a woman apostate who is not punished by death but by imprisonment only. This is because the masculine pronominal suffix that occurs in the wording of the hadith gives rise to an element of doubt concerning its application to women. They also quote in this connection the hadith concerning jihad in which the Prophet has said, "Do not kill a woman—*lā taqtulu al-marʾata*." Since a woman is not killed for original unbelief, she is not killed for apostasy either.[6]

Having been subjected to one level of interpretation, the hadith in question becomes open to other levels of interpretation. The death punishment therein may consequently be reserved for apostasy, which is accompanied by active hostility to the Muslim community and its leadership and would effectively be tantamount to high treason.[7]

As for the issue over repentance, two different positions have been taken, one of which is attributed to Imams Mālik (d. 179/795), Sufyān al-Thawrī (d. 161/778), and Abū ʿAmr al-Awzāʿī (d. 157/774) and upheld also by the majority to the effect that the apostate should be asked to repent over a period of three days and should not be killed before then. This position is roughly similar to those of the enemies at war (*muḥaribīn*) who must be offered the choice to embrace Islam before war is waged on them. The second view is attributed to Imams al-Shāfiʿī and Ibn Ḥanbal, which is the view also of Ḥasan al-Baṣrī (d. 110/728) and maintains that asking the apostate to repent is not necessary, even though recommended, and may be dispensed with altogether. The proponents of this view refer to the hadith just reviewed, which states that "one who changes his religion shall be killed", saying that the wording of the hadith is general and makes no provision for repentance.[8]

Juristic Opinion on Apostasy

A number of prominent ulama across the centuries and down to our own times have taken the view that apostasy is not a *ḥudūd* offence. Ibrāhīm

al-Nakhaʿī (d. ca. 96/717), the teacher of Imam Abū Ḥanīfah (a leading jurist and traditionist of the generation succeeding the Companions), and Sufyān al-Thawrī (d. 161/778), who is known as "the prince of the believers in hadith" (*amīr al-muʾminīn fīʾl-ḥadīth*) and who authored two important compilations on hadith,[9] both held that the apostate should be reinvited to Islam and should not be condemned to death. They maintained that the invitation should continue for as long as there is hope that the apostate might change his mind and repent.[10] Al-Nakhaʿī elaborated that asking the apostate to repent is not limited to once or three times, nor to one or three days, but that he should be continually asked to return to Islam. Abū Zahrah, who quotes al-Nakhaʿī, also agrees with him.[11] The Mālikī jurist Abū al-Walīd al-Bājī (d. 474/1081) and the Ḥanbalī jurist Ibn Taymiyyah (d. 728/1328) have held that apostasy is a sin that carries no prescribed punishment and that a sin of this kind may be punished by one year of imprisonment under the discretionary punishment of *taʿzīr*.[12] ʿAbd al-Wahhāb al-Shaʿrānī (d. 973/1565), author of the comparative fiqh work, *Kitāb al-Mizān*, has cited the views of al-Nakhaʿī and al-Thawrī and added that "the apostate is thus permanently to be invited to repent."[13] Further endorsement of this comes from the renowned Ḥanafī jurist, al-Sarakhsī (d. 490/1096, also known as Shams al-Aʾimmah), the author of the thirty-two-volume fiqh work *al-Mabsūṭ*, who held that apostasy does not qualify for temporal punishment and that there is no prescribed punishment (*ḥadd*) for it either. To quote al-Sarakhsī:

> Renunciation of the faith and conversion to disbelief is admittedly the greatest of transgressions, yet it is a matter between man and his Creator, and its punishment is postponed to the Day of Judgment [فالجزاء عليها مؤخر الى دار الجزاء].[14]

Three twentieth-century scholars and authors of works in contemporary fiqh, ʿAbd al-Ḥakīm Ḥasan al-ʿIlī, Ismāʿīl al-Badawī, and Abū Zahrah, have commented that by al-Nakhaʿīʾs time Islam was secure from the hostility of disbelievers and apostates. This, they maintain, indicates that al-Nakhaʿī understood the hadith quoted in the preceding discussion, which made apostasy punishable by death, to be political in character and aimed at the inveterate enemies of Islam.[15]

The late Shaykh of al-Azhar, Maḥmūd Shaltūt (d. 1383/1963), analysed the relevant evidence in the sources and drew the conclusion that apostasy

carried no temporal punishment because in reference to apostasy the Qur'an only speaks of punishment in the Hereafter. To quote Shaltūt:

> The hadith "one who changes his religion shall be killed" has evoked various responses from the ulama many of whom are in agreement that the *ḥudūd* cannot be established by solitary (*aḥad*) hadith, and that unbelief by itself does not call for the death punishment.[16]

Shaltūt also concurred with the analysis that the key factor underlining the prohibition of apostasy was to curb "aggression and hostility against the believers and the prevention of *fitnah* (sedition, civil strife) against the religion and state."[17] Issues of public security and defence of the community against hostility and sedition were, in other words, behind the prohibition of apostasy.

Ṣubḥī Muḥmaṣṣānī (d. 1407/1986) of Lebanon and Salīm al-ʿAwā of Egypt, both highly respected scholars, have observed that the death punishment was meant to apply not to simple acts and pronouncements of apostasy from Islam but to cases when apostasy was linked to an act of political betrayal of the community and high treason. The Prophet never killed anyone solely for apostasy. This being the case, the death penalty was not meant to apply to a simple change of faith but to punish acts of treason that consisted of joining forces with the enemy and sedition.[18]

The late Murtaza Mutahhari (d. 1399/1979) of Iran highlighted the incompatibility of coercion with the spirit of Islam as well as the basic redundancy of punitive measures in the propagation of its message. He wrote that it is impossible to force anyone to acquire the kind of faith that is required by Islam, just as "it is not possible to spank a child into solving an arithmetical problem. His mind and thought must be left free in order that he may solve it. The Islamic faith is something of this kind."[19]

Apostasy in Malaysia: An Overview

Notwithstanding some attention that apostasy has received in a few court decisions, it remains basically unregulated in Malaysia. Incidental references of the kind that are seen in these cases are not enough to overcome the basic constitutional question of whether or not penalising apostasy will be *ultra vires* the constitutional clause on freedom of religion. There is also the question of jurisdiction as to whether the civil courts or the shariah courts have the jurisdiction to adjudicate over cases of apostasy and

conversion. This is because as soon as a person renounces Islam, he or she is no longer a Muslim, and the shariah court jurisdiction in Malaysia only covers disputes by or among the Muslim parties. Even if one reaches the conclusion that the shariah court ought to have jurisdiction to determine issues pertaining to religious offences, the absence of particular laws to determine matters of personal freedom, the absence of undue influence and coercion, and the nature of any sanctions to be applied may prove problematic.

The Hudud Bill of Kelantan in Malaysia 1993 has offered a definition, as previously reviewed in this chapter, and the discussion concludes with a reiteration of the fiqh conception of this offence without any attempt to reconstruct it or bring it up to date. Apostasy is a highly contested concept and should be reviewed in line with the realities of contemporary Malaysian society, its multireligious makeup, the constitution and other laws, or a leading court decision with relevance to it. It has also made no attempt even to integrate the views of many prominent scholars discussed here who distinguish between apostasy and blasphemy and a carefully constructed educational approach to the issue of repentance. The sum total of this approach would be that there will be no difference, for the purposes of enforcing the death punishment under this bill, between a simple conversion that is neither contemptuous nor hostile and one that inflames the masses of Muslims and capable of causing civil strife beyond control.

The substance of this problem became the focus of attention in a Kuala Lumpur seminar where one of the speakers, then professor of Islamic law at the University of Malaya, Mahmud Zuhdi Abdul Majid, was quoted to have said in reference to the Hudud Bill of Kelantan that "there is no room for inquiry. This results in a blind acceptance of everything....The prevailing intellectual hollowness among the ulama [is such] that they cling to *kitāb fiqh* [books on jurisprudence] of jurists such as Shāfiʿī, Ḥanafī, or Mālikī, but these are law books, equivalent to that of Blackstone and Solomon, and they are not mandatory provisions. There must be an exertion of the intellect based on the Qur'an." The speaker then highlighted the "clergymen's inability" to differentiate the essence of the law and the jurists' opinion and said that "this poses a problem to the administration of Islamic laws in this country."[20]

Apostasy was a punishable offence in the early years of the advent of Islam due to its subversive effects on the nascent Muslim community and state. Non-Muslims and hypocrites, as per Qur'anic affirmation, acted in collusion to embrace Islam in large numbers in the morning only to

renounce it by the end of day so as to weaken the hearts of nascent Muslims. The present writer has elsewhere enquired into the early history of apostasy and the hadith that makes it punishable with death. There were about half-a-dozen such cases during the Prophet's time in Medina in which he had ordered the death punishment, although not all were carried out as some fled to Mecca before they were caught. It merits attention that the ten years or so of the Prophet's life in Medina witnessed at least twenty-six military engagements wherein the Prophet himself participated, and a much larger number of skirmishes (totalling over eighty), all in a relatively short space of time. It was wartime, in other words, and people who renounced Islam were actually individuals who would renounce Islam in Medina, immediately flee to Mecca, join the enemy forces, and fight back against Muslims. It was in this order and context that the hadith "whoever changes his religion shall be killed" was pronounced. For otherwise there is no case on record where the Prophet has actually ordered the killing of anyone for mere renunciation of Islam without the elements of active hostility and treason.[21] Evidence in the Qur'an that have been examined here and elsewhere is also supportive of the freedom of belief, attested by the fact that the Qur'an has discussed apostasy in no less than twenty-one places but has nowhere provided a punishment for it. Freedom of religion thus remains to represent the normative position of shariah on nonsubversive apostasy that is due purely to personal conviction and belief. Only when it is committed under aggravating circumstances, or when the lawful authorities consider that it is committed under conditions that represent a threat to the sensibilities of believers, may it then be subject to a deterrent punishment of *taʿzīr*.

Lastly, in the detailed discussion of repentance (*tawbah*) earlier, it was proposed that repentance should become an integral part of the penal philosophy of *ḥudūd*. We extend that proposal also to apostasy and concur with the view that repentance should not be confined to any particular time or number of days and should be continually sought and repeated as part of an educational approach that allows for a meaningful role for repentance.

IX

*Slanderous Accusation (*Qadhf*)*

THIS CHAPTER BEGINS with a definition of *qadhf* and proceeds with a review of the textual authority on it, along with a review of the typical words and expressions that convey the meaning of *qadhf* either directly or by implication. The chapter continues with an exposition on the scholastic views and issues that have arisen concerning the Right of God and Right of Man components of this offence—the status of the slandered person (*maqdhūf*) and the punishment of *qadhf*—followed by a conclusion.

Slander is defined, under both Sunni and Shii laws, as making an accusation of *zinā* against a Muslim of upright character or denying a person's legitimate descent, and the charge so made is not proven by four witnesses.[1] Textual authority on *qadhf* is provided in the Qur'anic verse as follows:

> And those who accuse chaste women but bring not four witnesses [to prove it], flog them with eighty stripes, and never accept their testimony [thereafter]. They indeed are evildoers. Unless they repent thereafter and mend [their conduct]; For God is forgiving, most merciful. (al-Nūr, 24:4–5)

وَٱلَّذِينَ يَرْمُونَ ٱلْمُحْصَنَٰتِ ثُمَّ لَمْ يَأْتُوا۟ بِأَرْبَعَةِ شُهَدَآءَ فَٱجْلِدُوهُمْ ثَمَٰنِينَ جَلْدَةً وَلَا تَقْبَلُوا۟ لَهُمْ شَهَٰدَةً أَبَدًا ۚ وَأُو۟لَٰٓئِكَ هُمُ ٱلْفَٰسِقُونَ. إِلَّا ٱلَّذِينَ تَابُوا۟ مِنۢ بَعْدِ ذَٰلِكَ وَأَصْلَحُوا۟ فَإِنَّ ٱللَّهَ غَفُورٌ رَّحِيمٌ.

The offence thus carries a fixed punishment of eighty lashes and a supplementary punishment that disqualifies the offender from acting as a witness until he repents and amends his acts. Muslim jurists have, by way of analogy, extended the prohibition of slander to include men in the same way as women. Anyone who accuses an upright person, woman or man,

of *zinā* and fails to prove the veracity of his or her charge is thus liable to the punishment of eighty lashes of the whip. The accuser stands as one who has lied and is permanently discredited as the result of becoming an upright witness. For the offence of *qadhf* to stand, the slandered individual (*maqdhūf*) must fulfil five conditions: being an adult who has reached the age of majority, being of sound mind, being a Muslim, having purity of character (*ʿiffah*), and being a freeman (this condition may now seem redundant).[2] If the slandered person is a minor, an unbeliever, or one who has a record of past prosecution of adultery or other crimes, his or her accuser will not be subject to the prescribed penalty. The charge of slander against such a person may fail to qualify, but it may still be considered as a malicious expression partaking in obscene language and subjected to a lesser punishment under *taʿzīr*.[3]

The occasion of revelation of this verse is reported to be connected with the famed episode over the loss of a necklace belonging to ʿĀʾishah, the Prophet's wife, when she accompanied the Prophet on the occasion of the Battle of the Ditch. Upon leaving for a three-day journey out of Medina, the Prophet took two of his wives with him, Umm Salmah and ʿĀʾishah. The latter lost her onyx necklace on the return journey while travelling on a howdah. The clasp of this necklace, which ʿĀʾishah's late mother had given her, was insecure and she lost it on the move. At the next stop, ʿĀʾishah "realised her loss and slipping away from under the curtain she went back to look for it. The men who had saddled and were leading the camel . . . failed to notice that one of the two howdahs was without its occupant. ʿĀʾishah found her necklace and when she returned, the army had left. Thinking that they would miss her and come back for her, ʿĀʾishah sat and waited until she noticed another traveler, Safwan the son of Mu'attal, one of the emigrants who had also fallen behind the army for some reason. When he saw ʿĀʾishah he stopped and recognised her saying 'Verily we are for God, and verily unto Him we return. This is the wife of the Messenger of God.' "[4] Safwan offered his camel and escorted her himself on foot to the next halt.

This episode became the talk of the town and eventually became known as "The lie—*al-ifk*" due to a Qur'anic revelation that ascertained ʿĀʾishah's innocence, but only after a great deal of anguish, in a long Qur'anic passage calling the rumour mere calumny and vindicating the truth of the matter (al-Nūr, 24:15–17). In the same sura the Qur'an also specified the punishment of adultery, and then also the penalty for those who slander honourable women—that the slanderer who charges such women be

punished with eighty lashes of the whip. The reports add that this sentence of slander (*qadhf*) was subsequently carried out on three of ʿĀʾishah's accusers, Misṭaḥ, Ḥassan, and Ḥamnah, from among the Hypocrites, who had spread the calumny and had also confessed to their guilt and thus were punished.[5]

It is a requirement of slander that the accusation of *zinā* is made in clear and unequivocal words that are in no need of interpretation. Slander that carries the prescribed punishment consists specifically of the attribution of adultery to a chaste and upright person, attesting that he or she has committed adultery or that he or she is the offspring of adultery; in the latter case the act of adultery is attributed to his or her father or mother. All of these factors constitute slander. It is a requirement also that the victim is a known person without any ambiguity as to his or her identity. Thus if someone addresses two or three persons by such terms that "one of you is an adulterer (*zānī*)," the prescribed punishment will not apply. Other insulting words that offend and humiliate a victim are also likely to fall below capital punishment but may be punishable under the principle of *taʿzīr*. Slander differs from other terms of insult in that its subject (i.e., adultery) is amenable to proof as to its truth or falsehood. Other terms of insult (such as calling someone a "son of a bitch," "dog," "ass," etc.) are mostly not amenable to that process and do not align with the idea of being proven or even refuted.[6]

Terms such as "O thief," "drunkard," "idiot," and so on, even though possible to prove or truthful, still do not constitute *qadhf* proper but are punishable under the discretionary principle of *taʿzīr*. Disagreement has arisen as to whether the charge of slander would hold if the accuser attributes adultery to someone who is incapacitated, such as being impotent or ill. Imam Ibn Ḥanbal considers that this charge can indeed invoke the punishment of slander, as the purpose of the shariah punishment for this offence is to protect the honour and good name of upright individuals regardless of the veracity of the charge, so long as the offence is degrading and humiliating. The majority position on this charge, however, is that the prescribed punishment will not apply. Thus according to the Imams Mālik, Abū Ḥanīfah, and al-Shāfiʿī, this is not a case of *ḥudūd* but one of *taʿzīr* because the proof of its veracity would "fall to the ground," but the accuser may be punished for hurting the feelings of the victim.[7] There is also disagreement as to whether accusing a chaste person of homosexuality and sodomy (*liwāṭ*) falls under slander proper. Whereas the Imams Mālik, al-Shāfiʿī, and Ibn Ḥanbal include this charge under slander, Imam

Abū Ḥanīfah maintains that adultery and homosexual intercourse are different and have different consequences. Charging someone with homosexuality is not a prescribed offence but it is punishable otherwise, and he recommends severe punishment for it.[8] Abū Ḥanīfah's view is justified, partly due to the guidelines of hadith that one should try to find a way out of the *ḥudūd* as far as possible, and the Ḥanafī view seems to offer a way out of that predicament.

The offence of slander is proven, under both Sunni and Shii laws, by the normal standards of proof, which is two witnesses of upright character who are impartial and have no background of hostility or close ties of kinship with any of the parties to the charge. If the victim of the charge denies the charge and says it is a lie, this may also be testified by any method of proof or documentation. However, if the accuser presses the truth of his claim, he has to prove the charge of adultery by the method of proof for that offence, which consists of testimony from four witnesses, excluding himself. Otherwise he would himself be liable to the punishment of slander.[9] However, if the accuser admits to the charge of slander, a valid confession before the court is sufficient without repetition.[10]

The offence of slander is premised, as already noted, in the concern for the protection of honour and the good name of upright individuals as well as to protect the integrity of the family unit against unjustified charges of adultery. Yet slander can also be abused and, especially in the context of rape, be used as an instrument to protect the rapist rather than the victim of rape.

The three Imams, Abū Ḥanīfah, al-Shāfiʿī, and Ibn Ḥanbal (and also the Shia Imamiyyah), have held that a father and grandfather are not liable to the prescribed punishment of slander if he/they accuse his/their son or grandson of adultery. This exemption also applies to the mother in the same way as to the father. The exemption here is due primarily to the special position of honour the parents are granted in the Qur'an and hadith; this position is not peculiar to slander but extends to all the other *ḥudūd* crimes. Yet the son is liable to the prescribed punishment, under both Sunni and Shii laws, if he accuses his father. The fixed *ḥudūd* penalties are thus not enforceable on the parents, but the parent may nevertheless be subjected to discretionary sanctions under *taʿzīr*. Only Imam Mālik has held that parents are also liable to the prescribed punishment of slander, based on an analysis that the Qur'anic verse on slander does not make an exception in this regard and so applies also to the father (but this is believed to be a weak opinion).[11]

For a perpetrator to be subject to the prescribed punishment of slander, under both Sunni and Shii laws, he or she must be a free and adult person (whether the perpetrator is a man or woman, Muslim or non-Muslim). The victim of slander must, in addition, be a Muslim and an upright person who is capable of sexual intercourse. An upright person here means one with a clean record who has never been convicted of unlawful sexual intercourse nor subjected to the imprecation (*liʿān*) procedure. Under Mālikī law, a woman need not be an adult but must be capable of intercourse, free, and Muslim. Unlike the other schools, the Mālikīs also penalise one who uses an indirect or metaphorical expression. For the other schools this would constitute uncertainty (*shubha*), which would suspend the standard punishment but may still be penalised under *taʿzīr*. The perpetrator is absolved of the charge if he or she actually proves the charge of adultery. If a charge is laid against a group of persons, the perpetrator is punished only once unless each person in the group has been individually addressed with the charge, in which case the punishment will multiply accordingly.[12]

The leading schools of law are in agreement that the punishment of slander is not enforceable unless it is requested by the victim; if the latter forgives the offender, there will be no punishment. This is so because, unlike most of the other *ḥudūd* offences, slander is a violation predominantly of the Right of Man/private right. Imams al-Shāfiʿī and Ibn Ḥanbal have thus held that, since slander consists mainly of the violation of the Right of Man, it resembles just retaliation, or *qiṣāṣ,* both of which are amenable to pardoning by the victim, and this is upheld by the majority. Those who differ—maintaining that all the *ḥudūd* crimes, including that of slander, consist primarily of the claims or Rights of God—also disregard any request made by the victim of the offence and entitle the ruler and judge to enforce it as soon as it is proven. Whereas the majority opinion entitles the victim of slander to grant forgiveness to the offender—whether before or even after it is reported to the authorities—the Ḥanafī school holds that the victim of slander is not entitled to grant forgiveness at any stage (i.e., before or after it is reported to the authorities). The Mālikī school holds that the victim of slander may not grant forgiveness after reporting it to the authorities but may do so before that eventuality. These positions relate to the differential views taken on whether slander belongs to the Right of God or to the Right of Man category of rights.[13]

The victim of slander must not only qualify the conditions of moral probity (or *muḥṣan*) at the time of the offence, according to the Ḥanafīs, Mālikīs, Shāfiʿīs, and Shia, but also continue to possess them until the

time of implementation of the prescribed punishment. If he or she loses that status and commits adultery, for instance, or becomes insane during the interval, the offender is not punished by the prescribed punishment. The Ḥanbalīs maintain, on the other hand, that punishment is enforceable once the offence is proven even if the condition of the victim changes afterward.[14]

The punishment of slander is also amenable to amalgamation (*tadākhul*) in the event of repetition. Thus if A charges B with adultery and repeats that charge again, even if several times, A is punished only once, regardless as to whether the charge is for the same offence of adultery or new offences after that. This can be said also of a situation where A is punished for the offence and then again charges B of the same or another offence of adultery. The prescribed punishment is not repeated, but A may be punished for repetition by way of *taʿzīr*.[15]

Notwithstanding some differences of opinion, the majority also apply the prescribed punishment of slander if the victim is a deceased person, whether male or female, provided that the legal heirs of the deceased demand it. This is so because the good name and reputation, as well as the state of probity (i.e., *muḥṣan*) of a person, are not terminated by his or her death. It is further added that attribution of adultery to a deceased person is also likely to soil the good reputation of his or her surviving relatives.[16]

There is general agreement also that the offender is permanently disqualified from being a witness before the courts of justice unless he repents. The repentance is acceptable, but whether that will qualify him to be a witness again is a subject of disagreement. While Imam Abū Ḥanīfah maintains that the offender is permanently disqualified, Imams Mālik and al-Shāfiʿī maintain that he may be admitted as a witness again, apparently based on an analogy (*qiyās*) with other *ḥudūd* offences. Since the perpetrators of theft and adultery are not disqualified from being a witness once they have been duly punished, that same position applies to the accuser in slander.[17] Slander in this sense is no graver, in other words, than other *ḥudūd* offences, all of which consist of violation of the Right of God, the only difference being that in slander the victim's right is stronger and also entails the right to decide whether or not to prosecute. But according to Imams Abū Ḥanīfah and Mālik, slander belongs to the Right of God category of offences, and it is not amenable to pardon after the matter has been brought to the attention of the court. Once that process has begun, enforcing the punishment of slander, it is said, is a matter of defending the Right of God, or the community's right, in the sense of demanding

punishment for those who attack the good name and honour of one of its members. Al-Qurṭubī, who has discussed the scholastic views, concludes that the mainstream position maintains slander to be a violation primarily of the Right of Man. Hence the victim is entitled to grant pardon or to prosecute, whether before or after the violation is reported to the authorities.[18]

It would undoubtedly bear greater harmony with the letter and spirit of shariah on the subject of *ḥudūd* to open the avenues of redemption and the possibilities whereby a prescribed punishment could be mitigated or reduced to *taʿzīr*. One such avenue would have been to make a provision for the victim of slander to determine whether he or she wishes that the punishment should be carried out. Failure to do so, which is the case, for instance, in the Hudud Bills of Kelantan and Terengganu in Malaysia, is tantamount to turning a blind eye to the Qur'anic provisions on repentance and forgiveness as well as the hadith to the effect that making an error on the side of leniency is preferable than making an error on the side of severity.

X

*Issues over Wine Drinking (*Shurb*)*

THIS CHAPTER RAISES the question at the outset as to whether or not *shurb* is one of the *ḥudūd* offences and then proceeds to review the textual authority on *shurb*. Questions have also arisen over the precise punishment of this offence, how is it proven, how and when it can be enforced, whether the punishment can be extended to other intoxicants and narcotics, and certain exemptions that the law grants on grounds of necessity. Responses to these questions will be reviewed alongside scholastic differences over the juridical descriptions of a drunken person, the actual duration of that condition, and its impact on punishment.

One of the basic issues over wine drinking is that it does not belong in the category of *ḥudūd* and that the evidence for classifying it under *ḥudūd* offences is less than decisive. Yet the majority (*jumhūr*) have held that *shurb* is one of the *ḥudūd* offences, but they have differed on the quantum of its punishment.

The Qur'an forbids wine drinking along with other activities and enjoins the faithful to avoid them:

> O you who believe, wine and games of chance and idols [worshipping] and divination with arrows are only an infamy of Satan's handiwork. Avoid it in order that you may succeed. (al-Mā'idah, 5:90)

يَـٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوٓاْ إِنَّمَا ٱلْخَمْرُ وَٱلْمَيْسِرُ وَٱلْأَنصَابُ وَٱلْأَزْلَـٰمُ رِجْسٌ مِّنْ عَمَلِ ٱلشَّيْطَـٰنِ فَٱجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ.

The prohibition here is conveyed in a command form to "avoid," which the jurists have understood to mean not only drinking but also the

sale and purchase of wine and liquor, taking a price for these items, carrying them from place to place, or making a gift of them.[1] Although wine drinking and activities relating to liquor have been clearly declared forbidden in the Qur'an, the text has not specified any punishment for them. The evidence in the Sunnah also indicates that the Prophet has not treated them as strictly *ḥudūd* offences. Wine drinking was very widespread at the time of pre-Islamic Arabs and was undoubtedly an entrenched aspect of their lifestyle, which is why the Qur'an took a gradual approach toward its prohibition. The practice was the subject of three separate verses revealed over a period of time in Medina. Initially the text spoke in a persuasive language advising people of the ill effects of wine drinking, and subsequently discouraged it near prayer times; it was only in the third of the three verses that it was declared totally forbidden. The Prophet is also known to have imposed different types of punishments for wine-drinking. According to reports, on occasion he ordered his Companions to reprimand the offender, in most cases it seems by beating him with hands, shoes, lashes with palm shoots and rolled-up clothes, and so on. There were also occasions where the Prophet only imposed a verbal rebuke of the wine drinker, just as instances are also known of him ordering dust to be splashed on the face of the drinker after punishment. This wide variety of sanctions is not known for any other *ḥudūd* offence, and it provides an indication that the Prophet did not treat wine drinking as a *ḥudūd* crime but as a *taʿzīr* offence, for which the punishment characteristically varies from person to person and takes into account the surrounding circumstances. *Ḥudūd* punishments are typically uniform and not variable according to persons and circumstances.

Several hadith reports have been recorded by al-Bukhārī and others, indicating that the Prophet has not determined a fixed punishment for drinking. Note for example:

> Al-Saib b. Yazid reported: During the Prophet's time, and also that of Abū Bakr and the early period of the caliphate of ʿUmar we used to strike the drunken with our hands, shirts and clothes (twisted into the shape of lashes) and it was toward the end of the caliphate of ʿUmar that he ordered forty lashes, and raised it to eighty when the accused was mischievous and disobedient.[2]

حدثنا السائب بن يزيد : كنا نؤتي بالشارب على عهد رسول الله (ص) وإمرة أبي بكر وصدرا من خلافة عمر فنقوم بأيدينا ونعالنا وأرديتنا حتى كان أخر إمرة عمر فجلد أربعين حتى إذا عتوا وفسقوا فجلد ثمانين.

Reports further indicate that when the first caliph, Abū Bakr, was faced with the issue over punishment of liquor drinking, he asked the Companions about it but they did not know of any precise punishment for it. The Shāfiʿīs seem to have followed the early precedent of ʿUmar b. al-Khaṭṭāb that also finds support in the Prophet's own Sunnah, which made drinking wine punishable with forty lashes. When ʿUmar further consulted the Companions, Abū Saʿīd al-Khudrī informed him that "the Prophet, pbuh, punished drinking with forty blows of the shoes," so ʿUmar converted the shoe strikes to lashes.[3] Then it is also reported that ʿUmar later followed ʿAlī b. Abū Ṭālib's response in which the latter drew an analogy between drinking and slander (*qadhf*): "When a person drinks, he is intoxicated, and when intoxicated, he raves and he hurls accusations." So the caliph ʿUmar determined the punishment at eighty lashes, evidently by analogy to slander, which carried eighty lashes of the whip by the clear ruling of the Qur'an. Both the Sunni and Shii schools maintain that the punishment applies only when the offender has recovered and is not in a state of intoxication.[4]

Those who maintain the punishment for drinking is eighty lashes follow the precedent of the caliphs ʿUmar and ʿAlī. The former is known to have increased the punishment to eighty lashes as already explained. Al-Qurṭubī, who wrote on this also, added that the majority have followed ʿAlī's (and ʿUmar's) version, whereas the Shāfiʿīs and the Ẓāhirīs and the Zaydī Shia have followed Abū Saʿīd al-Khudrī's version and held the punishment to be forty lashes only. Others have seen this variation between forty and eighty lashes as the range in which the punishment can vary, depending on the severity of the offence and the social mischief it might be representing. This is also perhaps an indication for the authorities to determine the punishment in light of the prevailing conditions of their societies.[5]

Muslim jurists are in agreement, in the meantime, that consumption of liquor is permissible for non-Muslims who may be living in a Muslim country, provided that their own religion has not prohibited the practice. This is based on the clear authority of a hadith that states, "We have been commanded to leave them alone in regards to their own religious beliefs."

أمرنا بتركهم وما يدينون.

Non-Muslims may, however, be punished for drinking, either by way of a prescribed (*ḥadd*) or of a discretionary *taʿzīr* punishment, if this is done in a manner that causes corruption and social mischief or in a way that promotes debauchery and drinking among the Muslims.[6]

Imam Muslim has recorded a hadith from Anas Ibn Mālik that the Prophet used to punish wine drinking with lashes from palm twigs and shoes forty times, and that this was deemed sufficient even if the offender had repeated the offence. As for the increased amount of punishment during the time of ʿUmar, it was because liquor consumption had increased significantly and had given rise to adverse consequences, which is why he increased the punishment. But this increase, it is added, is not a part of the *ḥudūd*; rather it is done by way of a discretionary deterrent punishment of *taʿzīr*—as the leader/Imam has the authority to do so.[7] According to a minority opinion, the Prophet's own precedent creates an obligation and must be followed. The variations that are reported are ad hoc additions, and the normative position remains that which the Prophet himself has authorised.[8]

Some scholars have reached the conclusion that the instrument used to implement the punishment of drinking should be confined to those that were employed during the Prophet's time: palm twigs, shoes, twisted clothes, and hands. The majority has held, however, that these as well as a whip may be employed. Some have even viewed that the whip should be reserved for the hardened offender who is unlikely to be deterred by the use of these other lighter instruments, thus suggesting variation in the pain inflicted for different categories and types of offenders.[9]

It is generally held by both the Sunni and Shii laws that the element of intent must be present for the prescribed punishment of drinking to be administered. The drinker must, in other words, have prior knowledge that what he was drinking was liquor and caused intoxication. If someone drank an intoxicating drink while thinking that it did not intoxicate, he is not liable to the prescribed punishment. The liquor drinker must also know that drinking wine and other intoxicants are prohibited. This being the basic position, it is added that ignorance of this kind is sustainable in a non-Muslim locality but not so in the Muslim land.[10] It is also necessary that intoxication materialises as a result of the drink. Many scholars have maintained that there are two aspects to the offense at issue: drinking as an intoxicant itself and actually getting intoxicated, both of which must be present. If someone drinks while knowing it is an intoxicant but does not actually become intoxicated, the prescribed punishment is not applied if

the drink is something other than *khamr* (*khamr* is wine obtained specifically from grapes). The Ḥanafīs are alone in this last position, but their ruling is based on how they understand the hadith that "*Khamr* is *ḥarām*, be it a large amount or small"; that it mentions *khamr* and its ruling does not therefore apply to other intoxicants in the same way. The majority of schools, namely the Mālikī, Shāfiʿī, Ḥanbalī, and Shia, do not consider actual intoxication as a separate element. So long as a person knowingly drinks an intoxicating drink, regardless of the name, quantity, or substance from which it is obtained, he commits the offence.[11]

Although a minority view stipulates that the intoxicating substance should be a drink in liquid form and taken in a quantity, however small, that reaches the digestive system, this view is superseded by the obvious meaning of another hadith saying that "every intoxicant is *khamr* and all *khamr* is forbidden [كل مسكر خمر وكل خمر حرام]." Hence all intoxicants, whether liquid, solid, or gas, are equated with *khamr* and equally made *ḥarām*. This would include opium, heroin, cocaine, hashish, and all other narcotics that intoxicate and overwhelm the faculties of reason and discernment. There is disagreement on the point as to whether the substance must be taken by mouth, a condition that the Ḥanafīs and Mālikīs have stipulated. Thus if a substance is taken in some other way, it may invoke a *taʿzīr* punishment but not the prescribed punishment of drinking.[12] Others have disagreed. It seems that subsequent developments have made the Ḥanafī and Mālikī positions obsolete—as many drugs are taken by injection, sniffing, and other methods that reach the system even faster. It further appears that the uncertainty about drinking alcoholic beverages other than *khamr* also relates to different views and locality specifications. Most of the ulama of Hijaz (Mecca and Medina) and the majority of schools of that region put other alcoholic beverages on par with *khamr* and hold that their consumption in whatever quantity is punishable on the same basis. The jurists of 'Iraq including the Ḥanafīs have held that if a person drinks these other beverages, he would only be punished if he actually gets intoxicated.[13]

The majority view proscribes the use of liquor and liquor derivatives in medicine based on the authority of the hadith that "God does not make cure for [the ailments of] my ummah what He has made *ḥarām* to them [إن الله لم يجعل شفاء امتي ما حرم عليها]." Imam Abū Ḥanīfah has held otherwise, however, on the condition that no other alternative is available and the case falls under necessity.[14] The basis for this view is the renowned legal maxim that derives from the Qur'an, also supported in the Sunnah, which says,

"Necessities make the unlawful lawful [الضرورات تبيح المحظورات]." It would appear then that pure wine or liquor should be excluded from the purview of this maxim. Yet it may be difficult to say the same about all alcohol derivatives. If they are present in a medication that saves life and no easy alternative is available, the physician may prescribe it, and the position would be subsumed under the rules of necessity.

As for the actual condition of intoxication that constitute the offence of drinking, Imam Abū Ḥanīfah has held that it means "the person loses his rational capacity (*ʿaql*) altogether; he cannot tell the difference between a small and a large amount, cannot distinguish the earth from the sky, nor a man from a woman."[15] Abū Ḥanīfah's two disciples, Abū Yūsuf and al-Shaybānī, have held, however, that intoxication means that the person speaks nonsense and does not know what he says. They derive this understanding from the Qur'an (al-Nisāʾ, 4:34) and their understanding is in conformity with the majority of other leading Imams.

The leading scholars of hadith, al-Bukhārī, Muslim, Abū Dāwūd, and Ibn Mājah, have also recorded a report from the fourth caliph ʿAlī in which it is said that he used to implement the *ḥudūd* on people and did not have any regrets even if the person died as a result of the punishment. An exception applied to the wine drinker, for if he died then ʿAlī was concerned about the payment of blood money (*diya*) for him as this was what the Prophet himself had done. What this meant was that the public treasury was not responsible for the consequences of *ḥudūd* proper, except for the wine drinker, because *ḥudūd* proper were determined by the texts of the Qur'an or Sunnah but the punishment of drinking was determined through *ijtihād*. Abū Dāwūd and Imam Aḥmad b. Ḥanbal have also recorded a hadith from Ibn ʿAbbās, who said that "the Prophet, pbuh, did not fix any punishment for wine drinking—*inna rasul Allāh lam yaqit fī'l-khamri ḥaddan*," which evidently means that it is a flexible *taʿzīr* punishment.[16]

General consensus has materialised to the effect that only the lawful authorities are within their rights to enforce *ḥudūd*, including the punishment for drinking. Notwithstanding this there has been confirmation by a majority of jurists, including the key Ḥanbalī scholar Ibn Qayyim al-Jawziyyah (d. 751/1350), the Shii Zaydī scholar al-Shawkānī (d. ca. 1255/1839), and the Mālikī jurist Ibn Farḥūn (d. 799/1397), who have not only classified drinking as a *ḥudūd* offence but also claimed a general consensus (*ijmāʿ*) on its punishment to have been fixed at eighty lashes—which is evidently not the case. Twentieth-century Muslim scholars including Muṣṭafā

Shalabī, Fatḥī Bahnasī, Muḥammad Salīm al-ʿAwā, and others have stated that the alleged *ijmāʿ* on drinking being a *ḥudūd* offence is incorrect and have held that it is a *taʿzīr* offence. The basic argument for this is based on the view that *ḥudūd* are by definition offences for which a fixed punishment is prescribed in the Qur'an or Sunnah. When this is not the case, the whole concept of *ḥudūd* collapses.[17]

The punishment is enforced, according to general consensus, by the confession of the accused or testimony of two upright witnesses. Only one instance of confession is enough, according to all the leading schools, although the Ḥanafī scholar Abū Yūsuf has held that all confessions should be twice, by analogy apparently to two witnesses being the standard requirement. Imam Abū Ḥanīfah and his disciple Abū Yūsuf have confined admissibility of confession in drinking to the time until the smell of alcohol on the breath still obtains and no longer after it has disappeared. So if someone confesses to drinking after the breath smell has perished, his confession is inadmissible. There is disagreement over the question as to whether the prescribed punishment of drinking can be enforced based on the smell of the drinker's breath alone. The majority considers breath smell as to be no more than circumstantial evidence, which is not free of an element of doubt, and that the punishment is not enforced on this basis alone. Thus it is said that the breath smell can be caused by merely tasting wine or gargling it or even by some natural resemblance of one's breath to the smell of alcohol.[18]

Imam Abū Ḥanīfah and Abū Yūsuf have, on the other hand, considered the duration of breath smell as the criterion of admissibility both for confession and witnesses in drinking, saying that testimony is also admissible only during this fragment of time. As soon as the breath smell ceases, testimony also ceases to be admissible. The majority have not agreed on this point with Abū Ḥanīfah and do not confine witnessing to that particular time segment.[19]

The question as to whether the judge may impose the prescribed punishment for drinking, based on his personal knowledge in the event that he has himself seen the incident or that the offender has confessed to him outside the courtroom environment, has invoked a negative response. The basic rule here is that the judge must rely on objective evidence presented in the courtroom. Muslim jurists have also held that the punishment for drinking is suspended: (a) when the offender retracts his confession and there is no other evidence; (b) when one or both of the witnesses retract their testimony and there is no other evidence; and (c) when one or more

of the witnesses loses their competence at any stage after adjudication and prior to enforcement.[20]

Al-Jazīrī has discussed the key Ḥanbalī scholar Ibn Taymiyyah's views in the latter's book, *al-Siyāsah al-Sharʿiyyah*, where he declared cannabis and hashish as *ḥarām* and subject to the prescribed punishment of liquor drinking, for these substances also overwhelm the faculty of reason and become an agent of corruption like liquor and even worse. Al-Jazīrī then concurs with Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah, who declared cannabis and opium to be forbidden (*ḥarām*).[21] In advancing these views and speaking forcefully for them, al-Jazīrī goes on to quote a number of hadith reports that equate all intoxicants to *khamr* (wine) and declare them all as *ḥarām* (most of the relevant hadiths have been reviewed in the preceding discussion in this chapter). Al-Jazīrī's review of the relevant hadith literature also includes the hadith that Ibn Abī Shaybah has narrated from Ibn ʿAbbās as follows: "When God makes something *ḥarām* He also makes earning through it *ḥarām* [إن الله إذا حرم شيئا حرم ثمنه]." The Prophet has declared every intoxicant *ḥarām*, which subsumes not only the consumption and smoking of opium, hashish, and all hard-core narcotics but also buying, selling, and promoting them. For hard-core drugs such as cocaine and heroin far exceed liquor in their damaging and dangerous effects on individuals and societies. Al-Jazīrī thus wrote: "Anyone who declares any of these permissible is attributing a lie to God Most High."

Also recounted in this connection are the views of some Ḥanafī scholars to the effect that "one who permits [smoking] hashish is a heretic [*zindīq*] and a pernicious innovator [*mubtadiʿ*]."[22] Muslims who occupy themselves in activities that involve trading in liquor, narcotics, hashish, opium, and cocaine and procure huge profits through them are engaging in *ḥarām* and live their lives through *ḥarām* earnings.[23] The majority (*jumhūr*) have held by consensus that, regarding one who knowingly sells grapes to a wine maker, "the price earned through it is *ḥarām* for him, contrary to selling grapes to those who buy them for their own consumption or lawful trades. Similarly one who knowingly sells arms to one who fights Muslims, the price earned through it is *ḥarām*."[24]

The leading Imams are in agreement on the prohibition (*ittifāq al-aʾimmah ʿalā taḥrīm*) of the cultivation of hashish and poppy seeds in order to obtain the prohibited substances from them for trading and other uses.

This is because by growing these substances, the farmers aid and abet others in the perpetration and spread of corruption.[25] Engaging oneself in growing these substances is surely indicative of consent for people to use them and trade and transact in them. For farmers who sell what they grow is tantamount to aiding and abetting in the spread of this evil. It is a moral and religious duty of every Muslim therefore to refrain from all activities that help the spread of drug addiction, such as farming and trading in them and promoting them in any way they know would harm society and spread corruption in the land, especially among the youth.[26]

XI

Enforcement of Ḥudūd *Punishments*

PROCEDURAL CONSTRAINTS

THIS CHAPTER DISCUSSES the fiqh provisions on how *ḥudūd* punishments, especially those that consist of flogging, are actually carried out with a degree of procedural accuracy and restraint. It also looks into the amalgamation and overlap of *ḥudūd* punishments and the effects, if any, of repentance in their enforcement. The discussion also considers two other issues: delay (*ta'khīr*) and the expiration of time (*taqādum*) in the proof, adjudication, and enforcement of *ḥudūd* punishments. The chapter begins with a note on the relative gravity and weighting of *ḥudūd* crimes in relationship to one another.

Muslim jurists have attributed a certain order and level of gravity in considering various *ḥudūd* offences. Thus it is held that the offence of liquor drinking is of lesser gravity than that of adultery, for the latter is proven by clear text in the Qur'an, whereas drinking is established in the authority of Sunnah. An additional factor is that adultery involves violation of the rights of others, whereas drinking is primarily an aggression upon one's own self. Adultery is also said to pose a greater threat to society compared to drinking. Then the commentary adds that the gravity of liquor drinking outweighs that of slander (*qadhf*), for drinking can be easily detected and prosecuted, whereas slander can involve a degree of uncertainty and interpretation as to its veracity or otherwise.

This manner of relative weighting and comparison is also reflected in how the punishment of flogging is carried out for each of these offences. The majority (*jumhūr*) and the Shia Imamiyyah have held that flogging in the case of drinking is applied on bare skin. The offender's clothes are removed except for his trousers (*shalwar*) that cover his private parts

(*ʿawrah*), as is also the case with regard to other *ḥudūd* offences that involve flogging. But in the case of slander, it is held that the offender may keep one layer of his clothing and remove the rest, such as woolen clothing and furs. An exception is recorded by Imam Muḥammad b. Ḥasan al-Shaybānī, the disciple of Imam Abū Ḥanīfah, who is of the view that the punishment of drinking and slander should both be executed in the same manner. In both cases, the convict is allowed to keep one layer of clothing and remove additional clothes. Then Imam Muḥammad b. Ḥasan al-Shaybānī quotes as an authority the fourth caliph ʿAlī's famed analogy, which equates drinking with slander: One who is drunk raves, and one who raves is also likely to utter slander—hence the two are about equal with respect to punishment. There is also a requirement of restraint in the enforcement of punishments, including *ḥudūd* and *qiṣāṣ*, so that in cases where there is fear of adverse effects they should be carried out under medical supervision, and enforcement may be delayed if expert opinion recommends such until the patient/convict recovers.[1]

Further on the manner of implementation of flogging in *ḥudūd* offences, it is stated that flogging should neither be too light nor too severe but rather shall be moderate. One who strikes the whip should not exaggerate either way. Flogging should not be concentrated on one spot or organ of the body but be evenly distributed. Flogging should in no case inflict injury, break the skin, or cause intolerable pain or death. The manner of application should also be tempered with the age and health conditions of the convict. Flogging should not be applied in sickness and the convict should be given time to recover. Additionally, flogging is not administered in excessively hot or exceedingly cold weather and must be put on hold until a milder climate or season arrives. If the person is elderly or ill with an incurable disease such as cancer, the instrument may be changed and a lighter tool, such as a palm shoot or light sandals, may be used. It is thus implied that any suitable instrument may be employed. The Shāfiʿīs and Ḥanbalīs have held that palm leaves, twined clothes, or shoes may be used for flogging an elderly drinking offender.

The whip that is used for flogging is usually made of a strip of leather about half a meter in length with a short wooden handle; and it is said that the instrument in question should be neither brand-new nor too old but in-between. If the person is drunk, flogging is delayed until he becomes sober. It is administered such that the striker does not raise his arm up to his head but only raises his arm up to his elbow. Flogging is to be

administered by a man. The offender is not to be humiliated nor subjected to undignified handling or treatment.

The Companion Abū Hurayrah has in this connection reported, as recorded in al-Bukhārī, that a man who had drunk intoxicating drinks was brought before the Prophet and then was ordered to be punished. So those present started striking the man with their shoes, others with their hands, and some also with rolled-up clothes. When the man was going away, some of those present scolded him with the words "may God humiliate you—*akhzak* Allah," to which the Prophet responded by saying to them, "Do not say this; and do not be an advocate of the Satan upon him."[2]

وعنه قال أتى النبي صلى الله عليه وسلم برجل قد شرب خمرا قال اضربوه قال أبو هريرة: فمنا الضارب بيده والضارب بنعله والضارب بثوبه فلما انصرف قال بعض القوم أخزاك الله قال لا تقولوا هكذا لا تعينوا عليه الشيطان.

On the authority of the Qur'an (al-Nūr, 24:2), it is recommended that flogging shall be carried out in public and witnessed by a number of Muslims.

If the number of lashes is one hundred, they may be divided in two parts and administered separately; but if the lashes are below that number, they shall be administered all at once and during the same session. Flogging is also not applied, under both Sunni and Shii laws, on a pregnant woman, nor shall they be applied to a breast-feeding woman until she weans the child. The woman is allowed to keep on all the clothing she wears. The genital area, head, and face (and, according to the Ḥanbalīs, also the chest and stomach) are to be excluded in all cases. There is a difference of opinion, however, on excluding the head. The Shāfiʿīs generally have held that the head is not excluded, and this view is shared by Abū Yūsuf, a disciple of Imam Abū Ḥanīfah. Whereas men are flogged in the standing position, women are allowed to sit. Exposure of *ʿawrah* (private parts) is forbidden in all cases of flogging.[3]

These limits and guidelines are also observed in flogging by way of a deterrent (*taʿzīr*) punishment, although opinions differ on whether or not the *taʿzīr* flogging should be more severe than that of the *ḥudūd* punishment. The best advice would seem to be that of moderation in the administration of flogging generally. The number of lashes are fixed in all three *ḥudūd* crimes, namely adultery, wine drinking, and slander, which may neither be increased or decreased. However, a fixed and predetermined number is not a strict requirement in flogging for *taʿzīr* offences.

According to the Shāfiʿīs and Imam Abū Ḥanīfah, as well as a minority opinion in the Ḥanbalī school, the maximum number of *taʿzīr*-related floggings should not reach that of the lowest number of lashes in the *ḥudūd* category, which would be thirty-nine lashes—assuming that forty lashes are prescribed for consumption of liquor. Imam Ibn Ḥanbal himself is reported to have held that flogging under *taʿzīr* should not exceed ten lashes of the whip, whereas the Mālikīs have not specified any limit and said they may, if necessary, even exceed 100 lashes in the *taʿzīr* category. The majority position on this is that no particular number is specified and it is for the Imam or his deputy and the judge to specify the number of lashes based on the principles of considerations of public interest (*maṣlaḥah*) and judicious policy (*siyāsah sharʿiyyah*).[4]

Some of the *ḥudūd* penalties amalgamate with one another, especially if they belong to the same binary categories of public and private rights, *ḥaqq Allāh* and *ḥaqq al-ādamī* respectively. Thus if someone commits both drinking and homicide, they both belong to the Right of God category and may amalgamate, in which case only the punishment for homicide is carried out. Similarly, if an unmarried person is convicted of drinking and adultery, and the latter carries 100 lashes, only the latter is carried out. This is the majority opinion except for Imam al-Shāfiʿī, who maintains that the *ḥudūd* punishments are separately carried out and none amalgamate with others. Thus if someone is convicted of liquor drinking, theft, and *zinā* and he is a married person (*muḥṣan*), each of the three punishments are separately enforced. Imam Abū Ḥanīfah has also held that the punishment of drinking does not amalgamate with any other *ḥudūd* penalties except for execution for murder. Imam Mālik has held that the punishment for drinking amalgamates with the one for slander as they share similar characteristics, and even motives (*mawjib*), reminiscent perhaps of the caliph ʿAlī's famed parallel between them.[5]

Ḥudūd punishments are also amenable to amalgamation if repeated. Thus if someone commits theft, adultery, or any of the other *ḥudūd* crimes two or three times before he is punished for the offence in question, he is punished only once, but if he repeats his crime after punishment for the first instance, he is liable to punishment again. Usually a lesser punishment also merges into a larger or more severe one. For instance, if a person causes death to one person and causes injury to another, he is liable to the death punishment only. But if the offences are numerous and are different in nature, all the punishments would amalgamate and only one

is applied, provided that the purpose of all the prescribed punishments for the offences committed is one and the same. For instance, if a person slanders a government officer, confronts him, and commits an act of injustice against him, he would be liable to a single punishment for all three offences for the purpose of the punishments is about the same, namely to protect abuse against government employees.[6]

A salient feature of *ḥudūd* crimes is that the doctrine has made it very difficult to obtain a conviction as the law avails numerous opportunities for the judge and the defendant to avoid conviction. This is achieved by (1) the strict rules of evidence for the proof of these crimes; (2) extensive opportunities to use the notion of uncertainty and doubt (*shubha*) in the defence; and (3) defining the crime very strictly, so that it becomes difficult to fulfill all the requirements. By the same token, many similar crimes fall outside the definition and cannot be punished nor subsumed under a prescribed *ḥudūd* crime. This often means that a lesser punishment is meted out by the judge under the principle of *taʿzīr*. "In the Hanafite doctrine in particular," as Peters wrote, "it is nearly impossible for a thief or fornicator to be sentenced, unless he wishes to do so and confess."[7] But even the rules of confession have made it possible for the accused to retract his confession at any stage prior to enforcement, even after he has been sentenced based on that confession. The *ḥudūd* offences, according to Muslim jurists, represent the claims or Rights of God, and God is sublime and without need, which may well make it unnecessary that all of His Rights are satisfied. In this regard, the claims or Rights of God differ from the Rights of Men, which must always be fulfilled if they are not waived by the right-bearer or claimant. It is further argued that the laws of *ḥudūd,* and especially the rules pertaining to theft and unlawful intercourse, are meant as rhetorical devices that set the standards of conduct very high. The severity of the punishments, namely of 100 lashes or stoning, if stoning is deemed valid, and amputation, serve in the first place as warnings to the public, but in reality they are made very difficult to implement.[8]

There is general agreement, under both the Sunni and Shii laws, that *ḥudūd* punishments are not implemented during military engagements nor in the *Dār al-ḥarb* (abode of war), that is, a country at war with the Muslims. The Prophet is reported to have said: "*Ḥadd* is not enforced on a Muslim in enemy territory."[9]

لا **يقام الحد** على مسلم في **أرض العدو**.

That said, it is added that army commanders and soldiers are advised to observe religious duties in the battlefield and refrain from sinful conduct—if they were to merit Divine help—and "there is no succour except from God, the Exalted, the Wise" (Q 3:126).

وَمَا ٱلنَّصۡرُ إِلَّا مِنۡ عِندِ ٱللَّهِ ٱلۡعَزِيزِ ٱلۡحَكِيمِ

This was also the advice the second caliph ʿUmar b. al-Khaṭṭāb gave to Saʿd b. Abī Waqqāṣ, an army commander in the battle of Qadisiyyah with the Persians. It is further reported that Saʿd b. Abī Waqqāṣ did not penalise a valiant warrior, Abū Mahjan al-Thaqafī, who fought the Persians with him. He was alcoholic and was even punished and banished for it by the caliph and later imprisoned; yet he was a fine man and a poet, and was not punished for repeated drinking offences during the Qadisiyyah expedition.[10]

> Saʿīd [from] Saʿd b. ʿUbādah, may God be pleased with them, narrated, "A small and frail man was staying in our tribe, and he committed adultery with one of their slave-women." Saʿd mentioned this to the Messenger of God Most High, and thereupon he said, "Flog him (according to) the prescribed penalty." The people then said, "O Messenger of God! He is too weak to bear it." The Messenger of God then said, "Get a stalk of the raceme of a palm tree with a hundred twigs and strike him just once." So, they did. Related by Aḥmad, al-Nasāʿī and Ibn Mājah with a good chain of narrators—but they differ on whether it is connected [all the way] or broken.[11]

وَعَنْ سَعِيدِ بْنِ سَعْدِ بْنِ عِبَادَةَ رَضِيَ ٱللَّهُ عَنْهُمَا قَالَ: كَانَ بَيْنَ أَبْيَاتِنَا رُوَيْجِلٌ ضَعِيفٌ, فَخَبَثَ بِأَمَةٍ مِنْ إِمَائِهِمْ, فَذَكَرَ ذَلِكَ سَعْدٌ لِرَسُولِ ٱللَّهِ - صلى الله عليه وسلم -فَقَالَ: "اِضْرِبُوهُ حَدَّهُ". فَقَالُوا: يَا رَسُولَ ٱللَّهِ! إِنَّهُ أَضْعَفُ مِنْ ذَلِكَ, فَقَالَ: "خُذُوا عِثْكَالًا فِيهِ مِائَةُ شِمْرَاخٍ, ثُمَّ اِضْرِبُوهُ بِهِ ضَرْبَةً وَاحِدَةً". فَفَعَلُوا رَوَاهُ أَحْمَدُ, وَالنَّسَائِيُّ, وَابْنُ مَاجَه, وَإِسْنَادُهُ حَسَنٌ . لَكِنْ اخْتُلِفَ فِي وَصْلِهِ وَإِرْسَالِهِ

As already discussed, repentance plays a special role in the context of *ḥirābah* and highway robbery, a role that is, however, determined by the clear text of the Qur'an. Repentance as such exonerates the bandit/terrorist if it is offered prior to subjugation and arrest by the authorities, but only in respect to a violation of the Right of God aspect thereof, but it does not affect liability for theft and homicide. Repentance is also given a legal role in the context of apostasy. The apostate is given an opportunity to repent and return to Islam and thus obtain impunity. Yet in actual practice,

the role of repentance even in apostasy has been confined to a relatively short segment of time, about three days prior to the enforcement of the death punishment, based on the precedent of the second caliph ʿUmar b. al-Khaṭṭāb.[12] The Ḥanafīs have accordingly maintained that it is recommended to ask the apostate to repent (*istitābah*) and return to Islam, which Imam Mālik has considered to be unnecessary. The Shāfiʿīs and Ḥanbalīs have recorded two different views, one of which corresponds with that of the Ḥanafīs and the other with that of Imam Mālik. The majority opinion thus stipulates *istitābah* as a requirement prior to the enforcement of punishment. This chapter has already discussed the view attributed to the fourth caliph ʿAlī, also supported by Ibrāhīm al-Nakhaʿī and Sufyān al-Thawrī (d. 161/778), that the door of repentance always remains open to an apostate for as long as he lives.[13]

Ḥudūd punishments may be suspended due to doubt caused by delay (*taʾkhīr*) in their claims, prosecution, adjudication, and enforcement proceedings. Delays caused by late claims may in turn become a ground for suspension, especially if the delay is due to the existence of doubt. This would need to be ascertained. If the delay is due to long-distance travel by witnesses who will give testimony, or due to illness that prevents prompt attendance, neither would be a reason for suspending the *ḥudūd* punishments, and the judge is expected to allow time until testimony can be duly obtained. Should the delay in testimony be due to intervention by influential people or intimidation of witnesses, the judge should again evaluate and decide whether to admit or decline the witnesses.[14]

As for the question whether doubt and delay in enforcement even after adjudication and sentencing can suspend the *ḥudūd* punishments, Imam Abū Ḥanīfah and his two disciples, Abū Yūsuf and al-Shaybānī, are of the view that it does, a view that is, however, not accepted by Imams Mālik, al-Shāfiʿī, and Ibn Ḥanbal. The Ḥanafī view is based on the rationale that, just as the expiry of a certain period of time (*taqādum*) is a ground for the suspension of *ḥudūd* prior to sentencing, it also works the same way after sentencing. The doubt may be due to retraction of testimony in the event where the witnesses retract what they have testified even after adjudication and sentencing. The retraction may be true or false, but in either case a doubt (*shubha*) is created and, based on the authority of a renowned hadith, doubt suspends *ḥudūd*.[15] Abū Zahrah has discussed this and found it to be a weak opinion, and he has also quoted the Ḥanafī jurist Kamāl Ibn al-Humām (d. 861/1457), the author of *Fatḥ al-Qadīr*, who is critical of giving any weight to retraction or delay after sentencing. A delay in the

claim or enforcement may, however, be due to remorse and repentance on the part of the perpetrator, which is given some consideration, especially by jurists who allow the suspension of *ḥudūd* offences that are proven based on confession of the accused person only. In the event where the latter runs away, even during the course of enforcement, and does not return for some time—this too can cause suspension of the prescribed punishment.[16]

Criminal sentences should ideally be carried out without unnecessary delay as justice delayed can compromise the integrity of justice, or even be tantamount to justice denied, as is commonly said. While immediate execution of punishment should never be at the expense of accuracy and due process, it is also desirable that the society is not burdened by protracted delays and the expenditure of excessive fees and resources on hired lawyers and court proceedings. However, should there be circumstances that endanger the life and safety of the convict, such as illness, pregnancy, and extremes of climatic conditions, the execution of corporal punishment is postponed, as already discussed, until circumstances permit safer application. Abū Zahrah adds that taking an attitude of care and compassion in the implementation of *ḥudūd* that the fiqh scholars have advised is taken from clear textual injunctions of the Qur'an and Sunnah and not merely a juristic opinion.[17]

Imam Abū Ḥanīfah has not specified the time lag that causes suspension of the *ḥudūd* punishments. Abū Zahrah takes this up and quotes Abū Yūsuf, Abū Ḥanīfah's disciple, to the effect that he urged the Imam Abū Ḥanīfah to specify the time lag but that he refused, saying that this should be for the judge to determine in light of the customs and prevailing conditions. But there is a second view, as is recorded by Kamal b. al-Humam, which has determined the expiry time for testimony at six months, and two other Ḥanafī scholars, al-Ṭaḥāwī as well as al-Zaylāʿī, have also concurred.[18]

According to yet another view attributed to Abū Yūsuf, al-Shaybānī, and even one view of Abū Ḥanīfah, doubt (*shubha*) is created by delay in testimony by even one month if no reason can be found to explain the delay. For one month marks the difference between promptness and lateness (*al-taʾjīl wa'l-taʾkhīr*). For instance, if someone swears to pay a debt promptly, he is expected to pay it within a month. Abū Ḥanīfah has also been reported to have said: "If the judge asks the witness 'when did so and so commit *zinā*?' and the witness replies: 'less than a month ago' the punishment for it is enforceable, but if he says 'a month ago,' it is to be suspended."[19]

Then it is added that the whole of this discussion over the expiry of time and whether or not a doubt is created by it relates to adultery and theft. As for wine drinking, there are two views, one of which maintains that, like the two *ḥudūd* just mentioned, expiration (*taqādum*) in wine-drinking is also one month. Imam Abū Ḥanīfah and his other disciple al-Shaybānī have held, as already mentioned, that the time lag in drinking is disappearance of the breath smell, and expiry takes place as soon as the smell has gone. For drinking is a weak *ḥadd*, which is not based on a clear text of the Qur'an or hadith, and it collapses when there is a slight doubt in its proof.[20]

Delay in the claim or enforcement of prescribed punishment for slanderous accusation is generally inconsequential. This is because slander according to the majority (*jumhūr*) of jurists belongs to the private rights category of *ḥudūd*, and delay in their enforcement or adjudication does not suspend any of the private rights. These are suspended, waived, or terminated only by the right-bearer and no one else. This is also the case, at least partially, with regard to theft, which consists of both Right of God and Right of Man components, the former of which is held to be the more dominant. The prescribed punishment of theft (i.e., the Right of God aspect) must be carried out when the offence is duly proven. Yet if the punishment of theft is suspended for reasons of doubt as explained above, the private right aspect of theft still remains and can only be satisfied by return of the stolen goods to the owner. Testimony and evidence with respect to this portion of theft may also be presented on a delayed basis, and the question of expiry of time is therefore not relevant to this aspect of theft or to slanderous accusation (*qadhf*).[21]

On a historical note, it may be said that Muslim judges who applied the rules of fiqh also took the Prophet's directive to ward off the *ḥudūd* by ambiguities as a divine command. All indications are that the *ḥudūd* punishments were very rarely carried out historically. A Scottish doctor working in Aleppo in the mid 1700s observed that there were only six public executions in twenty years. Theft was rare, he observed, and when it occurred it was punished by bastinado. A famous British scholar of Arabic in Egypt in the mid 1800s reported that the *ḥudūd* punishment for theft had not been inflicted in recent memory. In the roughly five hundred years that the Ottoman Empire ruled Constantinople, records show that only one instance of stoning for adultery took place.[22] In Europe from the Middle Ages through the 1700s, horrendous types of mutilation were standard punishment, such as amputating hands, fingers, ears, and tongues; burning with

hot tongs; and drawing and quartering. The shariah would thus appear to have historically been a restraining influence and also provided the people with a set of criteria on which to judge the conduct of their rulers.[23]

The Ottoman Penal Code of 1858 is an unquestionably shariah-compliant criminal law. Yet the code never mentions *ḥudūd* punishments, not because it eliminated them but rather because the whole code explicitly limited itself to reforming the *taʿzīr* level of punishments. Since the *ḥudūd* had not been an effective presence in legal applications, replacing all the shariah punishments with *taʿzīr* was tantamount to overhauling the whole of Ottoman criminal law.[24] *Taʿzīr* crimes were classified under three categories as *jināyah, janḥah*, and *qabaḥah*, each carrying a specified range of punishments (Arts. 1–47). While *jināyah* included the more serious crimes, including most of the *ḥudūd* crimes, *janḥah* subsumed crimes that were punishable for up to three years of imprisonment, and *qabaḥah* applied to minor violations.[25] The code recognised, in the meantime, people's rights to the *qiṣāṣ* in the case of homicide should they choose it.[26]

XII

The Philosophy of Ḥudūd

THE PHILOSOPHY OF punishment refers mainly to the objectives of punishment, such as deterrence, retribution, rehabilitation, and reform, which are discussed here in conjunction mainly with *ḥudūd*. It is generally recognised that the aims of punishment in all legal traditions, as also in the shariah, are mainly temporal and manifold: deterrence, retribution, rehabilitation, protecting the general public by incapacitating the offender, and ultimately justice. The shariah also adds to this the religious concept of expiation or atonement, which will be elaborated in the following discussion. Punishment also relates closely to the notion of redress by means of damages and compensation for the loss incurred. Broadly, it is stated that punishment has two principal objectives—one immediate and the other more remote. The immediate purpose of punishment is to inflict pain on the criminal for what he or she did and also to prevent him or her from repeating the act. The broader and more remote purpose of punishment is to protect the society against mischief and uphold its basic interests (*maṣāliḥ*) and standards of justice.[1]

The philosophy of punishment (*ḥikmat al-ʿuqūbah*) in *ḥudūd*, as well as in punishments generally, according to Ibn Taymiyyah, is to inflict pain on the evildoer and deter him from further indulgence in criminal behaviour. It is also to reform the criminal and rid him of the consequences of crime. Additionally, it is intended to protect the community from corruption and violence.[2] Wahbah al-Zuḥaylī has quoted both Ibn Taymiyyah and his disciple, Ibn Qayyim al-Jawziyyah, who maintained that penalising criminal behaviour partakes in the mercy and wisdom of God Most High to protect innocent people against the menace of crime by those who attack and destroy the lives and properties of people and damage their honour. The shariah thus enacted penalties for purposes mainly of deterrence and

retribution (*al-radʿ wa'l-zajr*) and devised for every crime just and proportionate punishment. The punishments so validated fall under the six headings of execution, mutilation, lashing, banishment, fines, and *taʿzīr*.[3]

The Arabic word *ʿuqūbah*, which is commonly used for the term "punishment," derives from the root word *ʿaqiba*, literally meaning that which follows or chases something else. Here the infliction of pain follows the crime, and it is in this sense that *ʿuqūbah* also occurs in the Qur'an (al-Naḥl, 16:126). *ʿUqūbah* is differentiated, in turn, from *ʿiqāb* (also *ʿadhāb*),[4] in the sense that *ʿuqūbah* refers to temporal punishment, whereas *ʿiqāb* is inflicted in the hereafter.

Jazāʾ is also synonymous with *ʿuqūbah* but again with a minor difference, which is that *jazāʾ* (recompense) carries both positive and negative connotations. The term is used in the Qur'an in both these capacities: as recompense for a good deed (al-Kahf, 18:88); and as recompense for an evil deed (al-Shūrā, 42:40).

It thus appears that the affirmative purposes of punishment are a familiar dimension of punishment in both the scriptural sources and the juristic doctrines of Islamic law. Yet the affirmative purposes of punishment in the scriptures have in many ways been diminished in the juristic doctrines of various schools and scholars of Islamic law.

Deterrence and Expiation in Ḥudūd

Deterrence underlines the notion that punishment will deter the offender from repeating the same course of conduct, which will also protect the society against his harm. Deterrence is the primary purpose of all punishment. One of the chief purposes of criminal law is to make the evildoer an example and a warning to all who may be similarly inclined. The society's typical response is that, through the rigour of penal sanctions, the offender's fate should be a terror and a warning to himself and to others.[5]

The idea of a fixed punishment, or an "exemplary punishment," also reinforces deterrence, as it integrates certainty and predictability that the offender will suffer the stated punishment. This is typical of the juristic concept of *ḥudūd*: fixed and predictable. Another feature of the deterrence theory is that punishment is carried out in public so that enforcement is seen by the society as a certain consequence of a particular crime. This aspect of deterrence is well illustrated in the Qur'anic punishment of 100 lashes for adulterers. The verse reinforces the deterrent effect of this punishment by prescribing, immediately after pronouncing the punishment,

to "let a party of the believers witness their punishment" (al-Nūr, 24:2). The prescribed measure for banditry or highway robbery in the Qur'an (al-Mā'idah, 5:36) is expounded in a fourfold punishment that culminates in death and crucifixion. In this case the executed body of the offender, according to the fiqh provisions, is placed on public display for a period of three days, evidently to serve as a warning and deterrence to potential offenders. The element of predictability and assurance is further endorsed by the fact that *ḥudūd* punishments are scripturally determined and command a degree of objectivity that is not amenable to adjustment and alteration by human lawmakers. Deterrence in all these cases is premised on giving a stiff lesson to the offender and protecting the society against his mischief in the future.[6]

As already stated, the primary objective of *ḥudūd* punishments is deterrence. This has two aspects: namely, special deterrence, which is to deter the criminal from further criminality; and general deterrence, which is achieved by publicising the enforcement of punishment. Individual deterrence has a restraining effect on the offender himself, and this has an aspect in common with rehabilitation and reform. These deterrents may also have a moral signification in that the offender renounces crime on moral grounds, whereas punitive deterrence merely frightens him off. It would seem, in the final analysis, that the various theories of punishment have aspects in common with one another, and a clear distinction between them may therefore be difficult to sustain. Muslim jurists have generally highlighted the deterrent effect of *ḥudūd* punishments more than any other such penalties. The main objective of *ḥudūd* penalties is thus to inflict suffering on the criminal so he does not repeat the crime, to make the penalty a lesson for others, and to protect the society against the criminal's menace.

Whereas the principal purpose of the institution of *ḥudūd* crimes and penalties is deterrence from acts that are harmful to humanity and that spread corruption among people, expiation (*kaffārah*) or purification from sin (*taṭhīr*) is also mentioned as an aspect of *ḥudūd* punishments. But this is only a secondary purpose and does not, in any case, extend to all their possible applications—as most of these punishments also apply to non-Muslims to whom the notions of repentance, expiation, and purification may not be applicable.[7] Repentance, however sincere, does not suspend *ḥudūd* punishments according to scholastic jurisprudence. It is generally agreed, nevertheless, that *ḥudūd* penalties act as a "concealer of sin" (*kaffārah*) for the offender and absolves him of the

torment of the hereafter. According to Shii law and some minority opinions among the Shafiʿī and Ḥanbalī schools, repentance expressed before the crime that has been proven in court prevents the enforcement of all the prescribed *ḥudūd* penalties, except for the prescribed punishment of slander (*qadhf*), which consists predominantly of a private right (the Right of Man).[8]

Kaffārah, which is the Qur'anic term for expiation, signifies the attempt on the part of a perpetrator of a sin/crime to hide his sin and to make up for his failing in a dominantly moral and religious sense. This is amply manifested in the aftermath of the renowned cases of adultery of Māʿiz b. Mālik al-Aslamī and that of al-Ghamidiyyah, both of whom confessed to adultery, repeated their confessions to the Prophet, and consequently were punished by stoning. The Prophet then said, concerning al-Ghamidiyyah, that she repented sincerely and was remorseful and "repented such that if it were to be distributed among seventy [sinners] of the people of Medina, it would have been more than enough to exonerate them all."

لقد تابت توبةً لو قسمت على سبعين من أهل المدينة لوسعتهم.

The Prophet also said, concerning Māʿiz, that he confessed to his act of adultery, expressed sincere remorse, and was punished. "God Most High forgave him and admitted him to Paradise. ...By God in whose hand my life reposes, he is now by the streams of Paradise immersing [with enjoyment] [والذي نفسي بيده إنه الآن لفي أنهار الجنة ينغمس فيها]." In a hadith that ʿUbādah b. Ṣāmit narrated, which features in all the major collections of hadith except for Abū Dāwūd, the Prophet has said the same about all of the *ḥudūd* punishments to the effect that one who commits these offences and is "then punished in this world, that would act as an expiation (*kaffārah*) for him in the hereafter [فعوقب به فهو كفارة له]." In a longer hadith recorded by al-Tirmidhī, the Prophet similarly said: "One who commits these ugly offences and is then punished in this world, God is too noble to double the punishment of His servant in the hereafter [من اصاب من ذلك القاذورات شيئا فعوقب به فى الدنيا فالله أكرم من أن يثنى العقوبة على عبده]." Al-Jazīrī, who quoted this, follows with a comment that this statement is the unequivocal authority on the point that *ḥudūd* punishments act as "concealers of sins." He also adds that this is the preferred position of the majority (*jumhūr*) and it prevails over the minority view of some that regard *ḥudūd* as crimes that also beget punishment in the hereafter.[9]

Expiation is the principal shariah requirement for the neglect of one's religious and moral duties—such as taking a false oath, failing to observe obligatory fasting, disrespect to one's parents, and neglect of certain religious rituals during the performance of hajj and so forth—except perhaps for expiation in accidental homicide, which is a legal requirement. Expiation or atonement is primarily concerned with the relationship of man with his Creator; even in cases where it is mentioned in the context of *ḥudūd* punishments, it deals with the relationship of the wrongdoer with God Most High, and not with one's fellow citizens or the society as such.[10] Expiation may also signify a point of difference between the Western and Islamic legal theories on punishments.

According to a longer hadith that all the major hadith collections have recorded, except for Abū Dāwūd, ʿUbadah b. Ṣāmit narrated the following:

> We were present at a meeting with the Prophet, pbuh, when he said: pledge me your allegiance that you do not associate any other deity with God; that you do not commit adultery and theft. Any of you who abide by this, his reward will be with God. . . . If any of you commit these acts, and God conceals his conduct, his affair rests with God; if God so wills He will forgive the offender or punish him.[11]

عَنْ عُبَادَةَ بْنِ الصَّامِتِ، قَالَ كُنَّا عِنْدَ النَّبِيِّ صلى الله عليه وسلم فِي مَجْلِسٍ فَقَالَ " تُبَايِعُونِي عَلَى أَنْ لاَ تُشْرِكُوا بِاللَّهِ شَيْئًا وَلاَ تَسْرِقُوا وَلاَ تَزْنُوا " . قَرَأَ عَلَيْهِمُ الآيَةَ " فَمَنْ وَفَّى مِنْكُمْ فَأَجْرُهُ عَلَى اللَّهِ وَمَنْ أَصَابَ مِنْ ذَلِكَ شَيْئًا فَسَتَرَهُ اللَّهُ عَزَّ وَجَلَّ فَهُوَ إِلَى اللَّهِ إِنْ شَاءَ عَذَّبَهُ وَإِنْ شَاءَ غَفَرَ لَهُ "

While quoting this hadith, Bahnasī adds that some jurists (namely al-Samarqandī, the commentator of *al-Kanz*) have held that punishments are inflictions on the offender in this life and protectors of him against torture in the hereafter, which is to say that they are concealers (*mukaffirāt*) in the hereafter.[12]

Muslim jurists have differed over the question as to whether just retaliation (*qiṣāṣ*) can also function as an expiation for the murderer and whether it can cleanse the murderer of his great sin. Some have responded that it does, and they quote to that effect the hadith that "*ḥudūd* (punishments) are expiators to their perpetrators [الحدود كفارات لأهلها]," saying that the hadith is generally worded and is as such inclusive of all punishments without making homicide an exception. Other jurists have disagreed, however, saying that punishment does not expiate the killer nor does it conceal his

sin. For retaliation (*qiṣāṣ*) does not benefit the deceased person but may be of some benefit to his family and those who are living.[13]

The juristic debate over this revolves around two verses in the Qur'an, one of which is affirmative on repentance generally and another that closes this avenue to murderers. The former passage is general in saying that God Most High will accept sincere repentance from anyone, even those guilty of associating other deities with Him or those who have committed adultery and murder, provided they repent, rectify, and then do good deeds (see also al-Furqān, 25:68–69). The passage even goes further to say that God will "change the evil of such persons into good, and God is oft-forgiving, most merciful." The other verse quoted is decisive on the enormity of murder and declares that, if anyone slays an innocent person deliberately, "his recompense is Hell to abide therein forever, and the wrath and curse of God will be upon him" (al-Nisāʾ, 4:93).

وَمَن يَقْتُلْ مُؤْمِنًا مُتَعَمِّدًا فَجَزَآؤُهُۥ ۚ جَهَنَّمُ خَـٰلِدًا فِيهَا وَغَضِبَ ٱللَّهُ عَلَيْهِ وَلَعَنَهُۥ ۚ وَأَعَدَّ لَهُۥ ۚ عَذَابًا عَظِيمًا.

The leading Companion Ibn ʿAbbās was asked a question as to whether the door to repentance remains open to the murderer. His response was in the negative and he quoted the latter verse in support, adding also that the previous verse was revealed in Mecca but that the latter was a Medinan verse and thus prevailed over the former. Murder is therefore not amenable to repentance even after the just retaliation (*qiṣāṣ*) is duly carried out.[14]

Retribution and Retaliation

Retribution and retaliation are both primarily meant to take vengeance against the wrongdoer and allay the victim's feelings and his or her yearning for justice. Such is the case in the "tooth for tooth, eye for eye and nose for nose" concept, which effectively translates into retaliation. The theory of retribution is based in ethical considerations: if someone commits wrong intentionally, it must be avenged; the evildoer is morally culpable and his case merits a stiff response from society. In ancient laws, retribution was the primary purpose of criminal jurisprudence and penal policy. With the progress of society, crimes began to be considered as wrong against humanity, society, and the state, and not only the individual victim, which is why the state initiates proceedings against the offender. This is also the reason that society is keen to punish the wrongdoer. Retribution has a pivotal place in the Islamic criminal justice system,

including *ḥudūd, qiṣāṣ*, and *taʿzīr*. Punishment is meant to inflict pain and secure justice for the victim, his family, and his relatives.[15]

The Islamic law of homicide is generally based on both retaliation and retribution, although deterrence also plays an important role. This is understood from the majority view of the Muslim jurists who hold that the way the death penalty for homicide is executed must be similar to the way the victim was killed and that, under supervision of the authorities, the heirs of the victim may carry out the death penalty themselves. This is the view of the Māliki and Shāfiʿī schools, whereas the majority maintain that the death penalty for murder must be carried out by an executioner under government supervision. The Ḥanafīs and Shia Imamiyyah allow execution only by the sword, whereas the other schools, on the basis of their readings of the relevant Qur'anic verses, hold that death shall be inflicted in the same way as the victim was killed. Only in cases when this would result in torture and delay, the death penalty may be carried out by the sword.[16]

The discretionary *taʿzīr* punishment is aimed mainly at deterrence and rehabilitation of the offender, that is, to deter him from repeating his wrongdoing and also to help in bringing him back to normal life. To achieve this, *taʿzīr* is meted out in accordance with the special conditions of the accused and the attending circumstances of the offence.

Punishment delineates the community's disapproval of crime, which it must, as the theory of retribution maintains, emphatically express. A community that is too ready to forgive the criminal may indulge in condoning crime. Muslim jurists have commonly acknowledged the retributive emphasis in *ḥudūd* punishments, and there is also ample evidence in the Qur'an to prove it.[17] God Most High expresses His disapproval in unmistakable terms by assigning a punishment for certain forms of conduct, and when this is the case there remains no question that the Muslim community should stand for it and enforce it. Retribution as a feature of *ḥudūd* punishments is manifested in the severity of these punishments as well as in foreclosing the possibilities of their suspension and adjustment by means of intercession, mediation, substitution, repentance, and pardoning. The *ḥudūd* are, in other words, all deemed to be mandatory. This rigour and the mandatory feature of these punishments have, on the other hand, been softened somewhat through the operation of such rules as "doubts suspend the *ḥudūd*." The fiqh position, for example—that a confession can be retracted at almost any point in the process, and once retracted the *ḥudūd* punishments are suspended because of it—is also a

case in point. There are a variety of other situations whereby the *ḥudūd* punishments are suspended, and when taken together they represent a significant reservation on the mandatory aspect of *ḥudūd* as well as their severity to some extent. But outside of these situations, the leading schools and scholars of fiqh have unequivocally emphasised the mandatory and invariable application of *ḥudūd*.[18]

Retribution also strikes a note with expiation but the two are different in some respects. By "expiation" it is meant that the offender has suffered his punishment, has purged his conscience, and his account with society is therefore clear. This attitude is seen, for example, behind the commonly expressed reluctance to hold a man's record against him after he has been punished.

Punishment can also be a means of protecting society by incapacitating the offender and removing him from society through a term of imprisonment, banishment, or execution. This is also the main rationale given by the proponents of punishment by way of judicious policy (*siyāsah*), imposed by the head of state or his representative, for the maintenance and protection of public order and security. Recidivists and habitual criminals who are not deterred by prescribed punishments may be kept in prison, based on judicious policy, and if necessary for long periods, so as to protect society against their harm.[19]

Rehabilitation and Reform

In recent decades, developments in criminology and penology tend to place an increased emphasis on the reform theory, which seems to bring this concept closer to the idea of treatment and cure. The criminal is accordingly regarded as a sick person—not necessarily an evil person—who is in need of treatment. The earlier emphasis on deterrent/retributive punishment has thus given way to some extent to methods of treatment in the direction of rehabilitation. Society acknowledges, in other words, that something has gone wrong for which the offender may or may not have been entirely or solely accountable. However, from the Islamic perspective, the culprit is primarily responsible for his actions. That said, it will be noted that society's role is recognised in some ways in Islamic law theories as the binary division of rights into the Right of God and Right of Man—the former is entrenched in society's claims and rights. Another concept of relevance is *ʿaqīlah,* which is inclusive even of one's colleagues in the workplace, who bear responsibility for some of the adverse consequences

of the criminal's conduct by the group to which he belongs. Additionally, *qasamah* (from *qasam*, putting on oath) is a near parallel to *ʿaqīlah*, as both refer to group responsibility.[20] Yet there is a tendency in the theory of *ḥudūd* to minimise the role that rulers and judges may play in the determination of punishment and its enforcement—although the theory of *taʿzīr* is clearly affirmative of that role. Fiqh sources generally recognise, nevertheless, that punishing the criminal means both retaliation and correction. Thus all punishments, including *ḥudūd*, consist of this dual purpose, yet the degree of emphasis varies in accordance with the nature of the transgression.[21] It is further stated that punishments emanate in the mercy of God Most High on His servants and the realisation of their welfare, like the father punishing his son or the physician treating his patient.[22] While quoting these, Tawfīq al-Shāwī is even persuaded to saying that "we prefer to use the word *al-jazāʾ* [recompense, sanction] rather than *'al-ʿuqūbah'* [punishment], for the latter stresses severity and revenge while the objectives of Shariah sanctions are not all confined to retribution and revenge but include ones that are not meant to inflict pain but to reform and correct the transgressor. That this can also be said of most of the sanctions visualized under *taʿzīr*."[23]

Al-Shāwī acknowledges that combining the two aspects of reformation and retribution is a fundamental aspect of Islamic criminal law, yet reforming the offender's personality has not received adequate attention in the conventional fiqh and he therefore calls for fresh *ijtihād*. Then it is added that, in the absence of a well-moderated theory of punishment, judges can hardly be expected to rectify this historical imbalance of paying scant attention to the personality and character of the offender in *ḥudūd*.[24] Clearly this presents a mixed scenario. Earlier in the chapter there is a discussion of *ʿaqīlah* and *qasamah*, both of which occur in the context mainly of *qiṣāṣ* and are clearly cognisant of society's responsibility and role for the conduct of their individual members. Yet they are also closely associated with tribes and clans and thus call for adjustment and transition to modern society conditions and modalities of government. There is scope for further research to ascertain the Islamic philosophy of punishment and the place and role of society/government therein with reference particularly to the reform and rehabilitation aspects of that philosophy.

This shift of emphasis towards rehabilitation and reform in modern penology has brought with it visible changes in the penal system and has led to the development of methods of treatment such as probation services, rehabilitation centres, and psychiatric services operating side by side

with prisons. There have even been adjustments in the methods of prison administration and the availability of books, television, and other services in prisons. Rehabilitation and reform would also require that the offender is given an opportunity in which he can be exposed to corrective and educational influences over a period of time. The idea of the prompt execution of punishment, especially in the case of heavy corporal punishments, does not afford the kind of opportunity that a reformative outlook on punishment might demand. Corporal punishments are usually meant to teach a sharp-and-shock lesson, which is in the nature of peremptory retribution and emphasises deterrence.[25]

Repentance, which is a recurrent theme in the Qur'an, has also not found a proportionate role in the juristic writings of fiqh nor even in the exposition of a theory of punishment. Insisting on automatic and mandatory enforcement of *ḥudūd* punishments, the fiqh scholars were consequently unable to make much of the Qur'anic references to repentance. For repentance is a state of mind that is not expected to come about through insistence on retribution and deterrence alone and thus necessitates a certain shift of attitude toward such other corrective and educational efforts as may seem appropriate. This shift should take place without lessening firmness or dropping vigilance in combating crime, but rather it should be done as part of a comprehensive approach that is richer, more resourceful, and capable of adaptation to the changing conditions of a contemporary Muslim society.

For a variety of reasons, including perhaps Muslim jurists' general aversion to philosophy and their textualist orientations, a comprehensive theory of punishment in Islamic criminal law has yet to be articulated. It would appear that a great deal of the ingredients are already there, and it may be a question to a large extent of consolidation and restatement of much of what is known in the source data of shariah. This shift should pay attention to modern scholarly contributions and experience and include a clear articulation of the role and place of repentance as well as the personal conditions of offenders in the determination and imposition of punishment.

XIII

Discretionary Punishment of Taʿzīr

TAʿZĪR (LIT., DETERRENCE) is a derivative of the root word *ʿazzara*, which means to avert, to deter, and to discipline and even to honour, help, and dignify, such as in saying that A aids B (against his enemy) (*ʿazzarahu fīʿaduwwihi*). It is a homonym that carries contrarious meanings. Punishment is called *taʿzīr* as it deters the offender from repeating the offence and reverting back to criminality. Juridically, *taʿzīr* signifies unquantified punishment for wrongdoing that is not included in *ḥudūd*, retaliation (*qiṣāṣ*), or expiation (*kaffārah*) offences, and it is imposed for violation of the Right of God, the Right of Man, or a combination of both. For the renowned Shāfiʿī jurist al-Māwardī (d. 450/1058), *taʿzīr* meant "punishment inflicted in cases of crimes for which the shariah has not prescribed any penalty. The rules relating to it differ depending on the circumstances in which it is imposed and the conditions of the offender."[1] *Taʿzīr* also differs from *ḥudūd* and *qiṣāṣ* in that the latter two do not afford the ruler and judge discretion or choice but require them to impose the prescribed penalty as soon as the offence is proven by admissible evidence, without increase or decrease. There is also no room for intercession and pardon in *ḥudūd*, although in *qiṣāṣ* the next of kin may grant forgiveness, in which case *qiṣāṣ* is likely to be suspended. Yet the authorities may consider imposing a *taʿzīr* penalty as public interest may so require.[2]

There is no minimum for *taʿzīr*; it may consist of any measure that inflicts suffering, whether a verbal reprimand; measures that entail social degradation, such as dismissal from public office; financial loss; flogging; or imprisonment.[3] Muslim jurists have differed as to the maximum limits of *taʿzīr*. Ibn Taymiyyah's account on this subject is generally considered to be representative of the majority, which is as follows: *taʿzīr* must not exceed ten lashes, and a vast number of ulama have held that it must not

reach the extent of the *ḥudud* penalty in any case.[4] Then there are two other views. One view is that *taʿzīr* must not reach the minimum of the *ḥudūd* or the lowest penalty in the range of the *ḥudud*. The other view holds that, in ascertaining the maximum limit of *taʿzīr*, one must refer to the offence type in the *ḥudūd* categories. In this way *taʿzīr* in property offenses (theft of unprotected property, for example) must not reach the prescribed punishment for theft even if it exceeds another *ḥadd*. Similarly, *taʿzīr* for sexual offences must not reach the capital punishment of *zinā* even if it exceeds another *ḥudūd*. This view refers to the precedent of ʿUmar Ibn Khattab, who punished the forger of his official seal with 300 lashes applied during three consecutive days. The Rightly Guided Caliphs are also reported to have ordered 200 lashes for an unmarried couple who were found under the same blanket.[5] Ibn Taymiyyah and his disciple Ibn Qayyim al-Jawziyyah hold that the number of lashes in *taʿzīr* should be limited to such categories but be left to the discretion and *ijtihād* of the Imam and judge to determine the punishment, based on considerations of public interest in what they may deem most appropriate, be it less or even more than the scholastic specifications listed in the doctrines of the various schools. This is considered to be the most preferable view, which also finds support in the valid Sunnah and early precedent.[6]

Qur'anic authority for *taʿzīr* is found in many of its verses, including:

> Whoever commits evil, he/she will be punished accordingly.
>
> مَن يَعۡمَلۡ سُوٓءٗا يُجۡزَ بِهِۦ.

The type and severity of punishment are to be determined with reference to the nature of the offence, the pain it has inflicted on the victim, and its implications for the community. Just punishment is neither too severe nor too light, as in the Qur'anic address to the believers (al-Shūrā, 42:40):

> And the recompense of an injury is an injury like it, but if a person forgives and amends, his reward is with God, and God loves not the oppressors.
>
> وَجَزَٰٓؤُاْ سَيِّئَةٖ سَيِّئَةٞ مِّثۡلُهَاۖ فَمَنۡ عَفَا وَأَصۡلَحَ فَأَجۡرُهُۥ عَلَى ٱللَّهِۚ إِنَّهُۥ لَا يُحِبُّ ٱلظَّٰلِمِينَ

Commenting on this, Abdullah Yusuf Ali wrote: "When you stand up for your rights, you may do so through processes of law and you must not seek a compensation greater than the injury suffered. The most you can

do is to demand equal redress, that is, a harm equivalent to the harm done to you. The ideal mode is, however, not to pursue vengeance but to follow better ways leading to the reform of the offender and reconciliation."[7] Further affirmation for this is found in another Qur'anic verse (al-Naḥl, 126) addressing the believers:

> And if you take your turn, then punish with the like of that with which you were afflicted. But if you show patience, it is surely better for those who exercise patience.
>
> وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا۟ بِمِثْلِ مَا عُوقِبْتُم بِهِۦ ۖ وَلَئِن صَبَرْتُمْ لَهُوَ خَيْرٌ لِّلصَّٰبِرِينَ

It thus appears that the Qur'an discourages impulsive revenge and haste in any form of punishment. Patience (*ṣabr*), one of the virtues that is emphasised in numerous places in the Qur'an, including the verses just reviewed, can either mean pardon or abstaining from rash decisions so as to allow time for investigation, reflection, and the possibility of forgiveness. It is also significant that most of the references to punishment and just retaliation in the Qur'an are accompanied by an allusion to the virtues of tolerance and forgiveness. The lesson here must be that even in combating criminality, a society cannot resolve its problems by means only of coercive measures, but must try to find better ways to educate its people, promote moral virtues, and reform wrongdoers. But the main purpose of the foregoing passages is also that in the enactment of laws or issuance of judicial decisions, the ruler and judge must mete out punishments that are just and proportionate to the enormity of the crime. If there is a margin of error, as would often be expected, then an error committed on the side of leniency and forgiveness is preferable, on the authority of hadith, to the one on the side of severity and harshness.

All acts of transgression and sinful conduct that the text has not specifically regulated but that partake in mischief and corruption are, in principle, punishable under *taʿzīr*. The head of state and judge may, at their discretion, impose deterrent and corrective punishments on the perpetrators of such acts. *Taʿzīr* has often been used as a residual category, and it has as such been more widely practiced than both the *ḥudūd* and *qiṣāṣ* penalties. Yet *taʿzīr* has also been extensively applied with regard to both *ḥudūd* crimes and retaliation (*qiṣāṣ*) in bodily injuries in which the offender could not be punished with the *ḥudūd* or *qiṣāṣ* proper for procedural reasons, lack of legally required proof, or presence of an element of doubt

(*shubha*). In bodily injuries and *qiṣāṣ* offences, when a pardon is granted by the victim or his next of kin, a reduced but suitable punishment under *taʿzīr* could be imposed in the public interest. Instances of such acts are illicit sexual acts not amounting to *zinā* or homosexual intercourse, misappropriation of the property of others not amounting to theft, embezzlement and forgery, as well as defamation and libel cases that do not fulfil the requirements of theft and slander respectively.

Taʿzīr is thus an open-ended category wherein the head of state and judge may decide to punish or even grant amnesty if this is deemed to be the best course of action. There is general consensus on this, but disagreement has arisen as to whether such discretionary powers exist with regard to all *taʿzīr* offences. Thus it is said that when a *ḥudūd* punishment is reduced to *taʿzīr*—due to some deficiency in proof or other material aspects of the offence—it would be a reduced case of a *ḥudūd* in which the authorities are not at liberty to grant amnesty.[8]

Muslim jurists have listed numerous acts and transgressions that can be punished by way of *taʿzīr*. Transgression in this range can consist of acting on what is prohibited (*ḥarām*) and abandoning what the shariah has made obligatory. The latter subsumes persistent refusal, for instance, to pay the obligatory alms of zakah, persistent neglect of ritual prayer (*ṣalāh*), refusal to repay a debt by a solvent debtor, concealment by the seller of what he must declare of the hidden defects of the goods he offers for sale, refusal to return usurped property to its lawful owner, and so forth. Betrayal of trust, or refusal to fulfill one, is also a *taʿzīr* offence, which may include disciplinary action against a witness, a jurisconsult, or even a judge for abandonment of an obligation (*wājib*) and manifest miscarriage of justice. Instances of forbidden acts and conduct also include theft of what may not be liable to the prescribed punishment; flirting, kissing, and illicit proximity (*khalwah*) with a woman that fall short of *zinā*; practice of usury (*ribā*); fraudulent sales; and all cases of perjury. All of these may be punished by way of *taʿzīr*. Juristic manuals tend to identify a scriptural basis for all of these in the Qur'an and Sunnah and have quoted most of the relevant passages to support why certain acts are deemed as transgression and may be accordingly penalised under *taʿzīr*. Yet when compared to the Qur'anic verses on *ḥudūd* crimes, the verses and expressions that support *taʿzīr* are less categorical. They mention an objectionable act or form of conduct without specifying any punishment for it, or even when a punishment is vaguely mentioned, it is not clear enough to offer a firm scriptural basis for an

offence, and subsuming it under *taʿzīr* is therefore often based on interpretation and *ijtihād*.[9]

A permissible act may also be made liable to a *taʿzīr* punishment if it is used as a means to mischief and procurement of an unlawful end, such as the double sale of *ʿīnah*, or some of the worst forms of it at least, according to the majority, which are used as means to procure the prohibited *ribā*. The Mālikī school would often apply the principle of blocking the (lawful) means to an unlawful end (i.e., *sadd al-dharāʾiʿ*).[10] This principle is often regarded as "one of the most important tools where judicious policy (*siyāsah sharʿiyyah)* can be utilised in order to improve the conditions of the community."[11] Since shariah is concerned with the ends and consequences of conduct (*maʾālat al-afʿāl*), it empowers the ruler to obstruct the means that lead to illegality and corruption. In other words, the ruler can authorise "forbidding the permissible (*mubāḥāt*) which are being used by the people as means to criminality and evil."[12] When the ruler or *walī al-amr* observes, for example, that the transaction of a sale (which is otherwise lawful) is being used solely as a means to procuring usury, or that marriage is contracted for the sole purpose of *taḥlīl*,[13] he is authorised to obstruct the means that open the ways to abuse and ensure that the permissible or *mubāḥ* act in question is only practiced for its legitimate purposes. It makes no difference whether the evil is obtained through deliberate abuse or through common practice in which the element of intention is not prominent. If, for example, due to the change of time and circumstance, something that was once lawful is subsequently turned into a mischief or *mafsādah*, the ruler may exercise discretion and ban and penalise it in order to safeguard the public interest.[14]

The foregoing has been mainly concerned with the lawful and the unlawful, the *wājib* and *ḥarām*, and ways in which they are manipulated in order to avoid a *wājib* or procure a *ḥarām*. Disagreement has also arisen with regard to the application of *taʿzīr* to someone who abandons what might be only recommendable (*mandūb*) or a person who acts on a reprehensible (*makrūh*) course of conduct. Many have considered these not relevant to *taʿzīr* as shariah designated them to be unrestricted and optional, and they do not therefore provide a suitable basis for punishment. Some jurists have referred in this connection to the precedent of the second caliph, ʿUmar b. al-Khaṭṭāb, who has, for instance, punished by way of *taʿzīr* someone for cruelty to animals. The incident in question involved a man who was whipped by way of *taʿzīr* for dragging a goat to the

slaughter place. What the man did was reprehensible (*makrūh*), but the caliph punished him for it nonetheless. This is also said with regard to disciplining one's child beyond what is reasonable; a nonbeliever who may be violating the mores of a Muslim community in an unacceptable way; or one who may be playing certain games or operating corrupt lines of trading, gambling, and so on. Another well-known precedent set by caliph ʿUmar in this connection is the renowned case of Naṣr b. Ḥajjāj. On one of his usual nighttime reconnaissance tours of Medina, the caliph heard a woman singing and wistfully mentioning the name of Naṣr b. Ḥajjāj. This man had evidently become well known for his good looks. The caliph summoned him and ordered his head to be shaved but this even increased his good looks! He then banished him to Basrah. It is said that this order was based on public interest, which was to curb a source of temptation for the women of Medina (operating somewhat like preventive detention, which is also permissible on the basis of public interest). Ḥajjāj had committed no offence but was convicted of banishment nonetheless, to which he objected but to no avail. Muslim jurists have recorded the concern, however, that *taʿzīr* for public interest should not be arbitrary but carefully verified by the ruler and judge.[15]

Taʿzīr is a subtheme basically of *siyāsah* and subsumed by considerations of public interest and justice. However, the judge does not create the offence, which is determined, for the most part, by the Qur'an or Sunnah, albeit less categorically than *ḥudūd* and *qiṣāṣ*. There is, in other words, basic authority in the scriptural sources, or the general consensus, on an offensive conduct or transgression in the first place. The judge is then granted flexibility to determine a suitable punishment for it.[16]

The principal purpose of *taʿzīr* is to deter the perpetrator from repeating the offence. Retribution as well as rehabilitation and reform all play a role in the selection of the punishment quantum and type. The main purpose of *taʿzīr* is not to inflict pain nor to humiliate persons or destroy their property or reputation. Jamāl al-Dīn al-Zaylāʿī (d. 762/1361), the commentator of the Ḥanafī text *al-Hidāyah*, wrote that the main purpose of *taʿzīr* is discipline (*taʾdib*), and it is contingent on safety (*salāmah*) such that destruction and loss is not the result. The renowned Mālikī jurist Ibn Farḥūn (d. 799/1397) also wrote that what is permitted in *taʿzīr* is that which ends with safety, otherwise it would not be permissible. No mutilation or infliction of injury can therefore be included in *taʿzīr*, for the simple reason that shariah has not validated it as such. The majority

(*jumhūr*) have also proscribed degrading punishments such as slapping on the face, shaving of a beard, and blackening of the face, although this last is mentioned to have been practiced for perjury (on the assumption that the convict blackened the face of truth!), but that is still regarded as a departure from the norm.[17]

Taʿzīr punishment is likely to be harsher for the hardened criminal and also when the offence committed is feared to spread fast if not curbed with exemplary sternness by the authorities. The offender's status also plays a role, for it is assumed that persons of distinction who may have fallen into error and are unlikely also to repeat the offence can be constrained by a mere rebuke or lighter punishment than the hardened criminal types.[18]

The most common type of punishment historically applied under *taʿzīr*, which may no longer be seen as the best option now, was flogging, but other punishments included public rebuke and publicity (*tashhir*), corporal punishment, and imprisonment. The authority for flogging as *taʿzīr* is also found in the hadith that states, "No one may flog above ten lashes of the whip except for a *ḥadd* of the God-ordained *ḥudūd*."[19]

لا يجلد فوق عشرة اسواط الا في حد من حدود الله.

Taʿzīr punishment in some cases may also include fines (*taʿzīr bi'l-māl*) although with the reservation that the state might use them to increase its revenue. Yet in principle *taʿzīr* is not confined to any particular type of punishment, financial or otherwise, and may consist of any appropriate sanctions, or a combination thereof, that the judge considers adequate based on his discretion and *ijtihād* in selecting the most appropriate sanctions (*al-ijtihād fī ikhtiyār al-aṣlāḥ*).[20] It may include, in our time, for instance, community work, police attendance, house arrest, and rehabilitation measures.

The schools of law have differed over the maximum punishment under *taʿzīr* and whether or not it can include the death penalty. The Mālikī school, which does not fix a maximum limit for *taʿzīr*, holds that the Imam has the authority to specify the number of lashes even if it be in excess of 100 lashes, provided that it does not lead to death. The majority maintain that *taʿzīr* should be below the *ḥudūd* punishments, and the authority quoted for this is the hadith that "one who punishes the equivalent of a *ḥadd* in what is not a *ḥadd* is a transgressor."

من بلغ حدا في غير حد فهو من المعتدين.

The schools of law have integrated the substance of this hadith to say that *taʿzīr* against a person may not reach the level of *ḥudūd* punishments in each category of the offences they may fall into, including defamation and sexual offences, property crimes, and so forth.[21]

As for the question as to whether capital punishment is a lawful *taʿzīr* penalty, Muslim jurists have debated this and agreed to allow it for specific crimes with certain conditions. Mention is thus made of a Muslim spying on Muslims for the enemy, spreading heresies, and some varieties of homicide that cannot be punished under retaliation (*qiṣāṣ*) proper. Imam Mālik and some jurists of the Ḥanbalī school have allowed the death penalty under *taʿzīr*, but the Imams Abū Hanīfah, al-Shāfiʿī, and also some followers of the Ḥanbalī school have disallowed it in principle, although Abū Ḥanīfah makes an exception to say that the ruler may punish recidivists and hardened criminals to death under *taʿzīr*. Ibn Taymiyyah has held that a persistent agent of corruption, whose spread of evil cannot be curbed except by killing him, may be killed.[22]

In support of this Ibn Taymiyyah quotes the hadith wherein the Prophet has permitted killing one who had staged an uprising against a legitimate leader duly elected by the people. "When you have all come to an agreement on one man to be your leader and then someone splits asunder this unity and rises against the leader, kill him."[23]

من أتاكم وأمركم جميع على رجل واحد يريد أن يفرق جماعتكم فاقتلوه.

There is a valid concern that open-ended *taʿzīr* can be abused and made an instrument of arbitrariness within the courtroom and beyond by judges, political leaders, and others. This is the concern also of the constitutional law principle of legality in crimes and punishments: there should be no crime and no punishment without a legal text that validates it. This principle has been widely adopted in the constitutions of the present-day Muslim countries, which would arguably make it a part of the *aḥkām ūli al-amr* (commands of the lawful rulers) that also command obedience in shariah. It is proposed therefore that parliamentary legislation may duly stipulate and limit the use of *taʿzīr* powers—as has already been the case to a large extent. It is our belief also that open-ended *taʿzīr* is not in harmony either with the constitutional principle of legality or even of shariah itself. The ugly realities of official corruption present a

pressing concern that justifies the idea of a carefully regulated *taʿzīr*. The discussion here does not propose total elimination of *taʿzīr* discretionary powers but advocates for a carefully regulated *taʿzīr* within the larger rubric of government under the rule of law that meets the requirements of both shariah and contemporary constitutional law principles in crimes and penalties.

XIV

Judicious Policy (Siyāsah Sharʿiyyah)

siyāsah sharʿiyyah is a broad doctrine of Islamic public law that authorises the ruler to determine the best manner in which shariah can be administered. The ruler may accordingly take discretionary measures, enact rules, and initiate policies that he deems are in the interest of good government, provided that no substantive principle of shariah is violated. The discretionary powers of the ruler under *siyāsah sharʿiyyah* (henceforth *siyāsah*) are particularly extensive in the field of criminal law outside *ḥudūd* and *qiṣāṣ*. The head of state and those who are in charge of public affairs, the *ʿūli al amr*, may thus decide on appropriate rules and procedures in order to discover truth and determine guilt. With regard to the substantive law of crimes, the authorities have powers to determine what behavior constitutes an offence and what punishment is to be applied in each case.[1] For example, in a case of legislation in 1897 in Egypt, which remains valid to this day, the law denied admission to witnesses in some cases and confined the means of legal proof to documentary evidence in others.[2] The purpose of this legislation was, as ʿAbd al-Wahhāb Khallāf (d. 1375/1956) put it, "to prevent corruption and to facilitate benefit which were in accord with the principles of shariah even if it disagreed with the views of the *mujtahidūn* of the past."[3] The learned author went on to quote the Mālikī jurist Shihāb al-Dīn al-Qarāfī (d. 684/1285) at length to the effect that nothing could be found in shariah against taking measures, in any area of government, that would eliminate corruption and facilitate benefit to the community.[4]

The jurists of the later ages (*al-mutaʾakhkhirūn*) have, however, used *siyāsah* in a more restricted sense, that is, the administration of penalties meted out by rulers and judges in order to combat criminality and evil. This is especially applicable under emergency situations when normal rules seem difficult to apply, thereby confining *siyāsah* to criminal justice alone.[5] Rulers have thus ordered the killing of criminals who robbed

people's houses at times when calamities, such as fire, earthquake, and war, caused the occupants to escape danger, or when kidnappers terrorised people and inflicted suffering on the parents and relatives of their victim. But to confine *siyāsah* to the administration of penalties is not totally justified, for *siyāsah* has a much wider scope, which can equally apply in other areas of government such as taxation, economic development, foreign policy, and so forth where the ruling authorities can take initiatives in the interest of good governance and justice.

Islamic criminal justice is only partially regulated by the clear text, which obtains mainly with regard to *ḥudūd* crimes and *qiṣāṣ*, but throughout the greater part of Islamic history a much larger realm of crimes and penalties has been regulated by state laws and ordinances that broadly fell under the rubric of judicious policy, or *siyāsah*, which subsumed, in turn, the deterrent yet unquantified punishment of *taʿzīr*. Measures introduced by way of *siyāsah* must address issues as they arise in a manner that also observes the higher purposes of shariah (*maqāṣid al-sharīʿah*).[6] This is, indeed, the overriding theme of all *siyāsah*, as ʿAbd al-Raḥmān Tāj rightly noted: "*Siyāsah*, in its widest sense, has five purposes: the protection of life, religion, mind, lineage, and property."[7] Muslim jurists are unanimous that protection of these values constitutes the ultimate objective of shariah, even if no specific reference can be found to that effect in the Qur'an or the Sunnah. The general consensus of Muslim scholars on these values is based not on a particular provision of the Qur'an or the Sunnah but on the overall content of these texts and the numerous commands and prohibitions therein that seek to protect these values. [8]

Bringing ease to the people and removing hardships from them are among the general objectives (*maqāṣid*) of shariah, which is grounded, in turn, in the textual authority of the Qur'an—as in the following verse:

> God intends every facility for you and He does not intend to put you in hardship. (al-Baqarah, 2:185; see also al-Ḥajj, 22:78)
>
> يُرِيدُ ٱللَّهُ بِكُمُ ٱلْيُسْرَ وَلَا يُرِيدُ بِكُمُ ٱلْعُسْرَ

Ibn Taymiyyah, who wrote a book on *siyāsah*, has quoted a pertinent hadith: "Gentleness does not fail to create beauty whereas harshness is most likely to lead to ugliness."[9]

إِنَّ الرِّفْقَ لَا يَكُونُ فِي شَيءٍ إِلَّا زَانَهُ وَلَا يُنْزَعُ مِنْ شَيْءٍ إِلَّا شَانَهُ

And he quotes another hadith that states: "God is Gentle and loves gentleness (*rifq*) and gives through gentleness what He gives not through oppression (*ʿunf*)."[10]

إِنَّ اللَّهَ رَفِيقٌ يُحِبُّ الرِّفْقَ وَيُعْطِي عَلَى الرِّفْقِ مَا لَا يُعْطِي عَلَى الْعُنْفِ.

The Companion Abū Burdah al-Anṣarī has reported that when the Prophet sent Muʿādh b. Jabal and Abū Mūsā al-ʿAsharī to Yemen (they were each appointed to govern a part of Yemen), he instructed them: "Be gentle to the people and not hard on them, bring them good tidings [of mercy] and scare them not, and do not incite them to aversion."[11]

يَسِّرَا وَلَا تُعَسِّرَا ، وَبَشِّرَا وَلَا تُنَفِّرَا

Another important aspect of just and judicious sentencing based on *siyāsah* is the fulfilment of trusts (*al-amānāt*) and giving to everyone their due, as the Qur'an has enjoined in the following verse: "God commands you to hand over the trusts to whom they are due, and when you judge among people you judge with justice" (al-Nisāʾ, 4:58). Commenting on this passage, Ibn Taymiyyah noted that the ruler and the ruled both are enjoined to pay their dues to one another.[12] The citizens must not expect from the government more than what they deserve, nor must they withhold any payment to which the government may be entitled. The Prophet has ordered the Muslims to "pay the ruling authorities what they are entitled to, for in their capacity as custodians, they [both ruler and ruled] are answerable to God in respect of what has been placed in their custody."[13]

Questions also arise at the policy level over philosophical viewpoints and attitudes taken toward punishment, including deterrence, retaliation, and reform, as well as the possibility of amnesty to individuals and groups, especially in the context of postconflict justice situations where strict rules of law may be difficult to apply. Similarly, whether a legal punishment is to be carried out against a repentant, first-time offender or a nonrepentant recidivist, one should not be bound by issues of legality while facing larger concerns of peace and normal order in a fragile environment such as now obtains in many Muslim countries, including Afghanistan, Iraq, Libya, and Syria. This viewpoint underscores the importance of the Islamic public law principle of *siyāsah*, for it empowers the authorities to act in accordance with the spirit and objectives of shariah at the expense even of a departure from scholastic interpretations and *ijtihād*.[14]

Ibn Qayyim al-Jawziyyah, Ibn Taymiyyah's disciple who also authored a book on *siyāsah*, noted that the Prophet occasionally ordered flogging, or doubled the amount of compensation in mitigated cases of theft, and gave orders to smash the container in which wine was found. Ibn Qayyim maintains that in cases where a judge sets free the accused, after taking an oath for instance, and insists there should be no punishment without the testimony of upright witnesses, even though the accused has a reputation for corruption and robberies, verily acts contrarily to *siyāsah shar'iyyah*.[15] It is not just *siyāsah* to always reject claims that are not accompanied by upright witnesses.

The judge is authorised to admit witnesses of lesser qualification (*ghayr 'udūl*) if this would prove to be the only way to protect the lives and properties of people.[16] In their efforts to protect people against aggression, the most capable of rulers have exercised intuitive judgment (*farāsah*) and took decisions on the basis of circumstantial evidence (*amārāt*).[17]

Qur'anic authority for *siyāsah* is found in a number of its injunctions, especially those enjoining the believers to promote the good and prevent the evil.[18] *Siyāsah* is thus an instrument in the hands of lawful authorities and the *ulū al amr* with which to discharge this duty. But more specifically, the Qur'anic command, addressing the believers to "obey God, obey the Messenger and those who are in charge of authority from among you" (al-Nisā', 4:58), provides the necessary authority for *siyāsah*. Obedience to legitimate leaders is thus a Qur'anic duty of Muslims, provided that the latter themselves are obedient to God and to His Messenger. Every Muslim must, therefore, comply with the dictates of a just policy when it consists of measures that protect and advance the ideals of justice and *maṣlaḥah*.[19] In numerous places, then, the Qur'an has enjoined Muslims to focus on the pursuit of good and prevent corruption and evil. The forms of good and evil are not listed in the Qur'an or the Sunnah, but they can be known through a general investigation of these sources. The renowned Mālikī jurist from Andalus, Ibrāhīm al-Shāṭibī, also drew attention to the point that rights and wrongs cannot all be known in detail in advance without referring to particular acts and their surrounding circumstances as and when they occur.[20] Hence, the authorities must have powers to uphold and protect the objectives of shariah and be able to order punishment for conduct that violates the sanctity of these values.[21]

Ta'zīr is a subcategory of *siyāsah* as both validate discretionary punishment in pursuit of justice, with the main difference being that *ta'zīr* involves a judicial process whereas *siyāsah* may not. Another difference

of note is that *taʿzīr* can on the whole be imposed only for acts of transgression already committed where those acts are also forbidden, explicitly or through interpretation, by shariah, whereas punishment under *siyāsah* may be imposed for acts that may not amount to an offence per se. *Siyāsah sharʿiyyah*, as Khallaf has observed, is tantamount to acting on *maṣlaḥah*, or public interest, which the Lawgiver has neither upheld nor overruled.[22] Judicious policy, as such, "denotes administration of public affairs in an Islamic polity with the aim of realising the interests of, and preventing harm to, the community in harmony with the general principles of shariah even if it disagrees with the particular rulings of *mujtahidūn*"[23] An example of this is the often-cited case of Naṣr b. Ḥajjāj of Medina at the time of the second caliph ʿUmar b. al-Khaṭṭāb. Naṣr's good looks had become a temptation for women. The caliph banished him from Medina, and in response Naṣr protested and asked what he had done to deserve this banishment. ʿUmar is reported to have replied: "You have not committed a sin, but I would have committed one if I had not cleansed this town from your mischief." Whereas *taʿzīr* mainly aims at deterrence and reform of the offender, *siyāsah*-based punishment is for protection of the public interest and protection of society from anticipated mischief, sedition (*fitnah*), and danger to public order. In the Ottoman Empire, *siyāsah* punishment very often consisted of the death penalty, or severe corporal punishment, for habitual criminals.[24]

Many observers have expressed concern over the wide discretionary powers that rulers and judges enjoy under *siyāsah* and *taʿzīr*. Thus it is said that *siyāsah* defies effective control and is open to abuse, which may ultimately undermine the ideals of justice under the rule of law. One observer has thus considered *siyāsah* as "direct negation of what may be regarded as the second essential implication of the idea of the rule of law in a secular system—namely, the principle that the sovereign must not possess any arbitrary power over the subject."[25]

According to Ibn Qayyim, *siyāsah sharʿiyyah* does not necessarily mean conforming to the explicit rules of shariah. In his widely quoted words on this subject, "any measure which actually brings the people closest to beneficence (*ṣalāḥ*) and takes them furthest away from corruption (*fasād*) partakes in just *siyāsah* even if it has not been approved by the Prophet, pbuh, nor regulated by divine revelation. Anyone who says that there is no *siyāsah sharʿiyyah* where the shariah itself is silent is wrong and has misunderstood the Companions."[26] Ibn Qayyim also divides *siyāsah* into two types: unjust *siyāsah* (*siyāsah ẓālimah*), which shariah forbids; and just

siyāsah (*siyāsah ʿādilah*), which seeks to serve the cause of justice. Since justice is the principal goal of *siyāsah ʿādilah*, it is an integral part of shariah and always in harmony with it. "We merely call it *siyāsah* because of the linguistic usage, but it is nothing other than the justice ordained by God and His Messenger."[27] God Almighty sent messengers and scriptures to mankind in order to establish justice among people. When there are signs that indicate the path to justice, it is in accord with the Law of God to aim toward it.[28]

XV

*Just Retaliation (*Qiṣāṣ*)*

MUSLIM JURISTS, BOTH Sunni and Shia, have classified homicide into three main types: (1) murder (*qatl al-ʿamd*), which is punishable by just retaliation (*qiṣāṣ*); (2) killing that is a result of error (*qatl al-khaṭāʾ*), such as when a hunter shoots and kills a human being whom he mistook for game (this is punishable by payment of blood money (*diya*) to the heirs of the deceased plus an expiation (*kaffārah*) that consists of charity to the poor or of atonement by fasting; and (3) culpable homicide (*qatl shibh al-ʿamd*), such as when A strikes B with a stick without intending to kill him but his hostile act actually kills B (this too is punishable by payment of blood money (*diya*)).

Qiṣāṣ (lit., equivalence) juridically requires that the perpetrator of a given crime is punished in the same way, in the same proportion, and if possible by the same means that he used in killing or hurting his victim. The punishment should, in other words, be equal to the crime as far as possible. *Qiṣāṣ* under Islamic law applies to a murderer who kills with the intention to kill or with the intention to cause bodily injury that is likely to cause death. The use of a weapon or lethal instrument in homicide is often indicative of the intention to cause death on the part of its user.

Retaliation, or *lex talionis*, is the principal punishment for murder, whereas payment of blood money is the principal punishment in unintentional homicide. Blood money is also paid in murder cases in which the victim's relatives waive their right to retaliation and choose to receive compensation. As a general rule, blood money is payable by the killer himself or his agnatic relatives and legal heirs (*ʿāqilah*).

The Qur'an provides the basic authority for just retaliation, as in the following passage:

> We prescribed to them [the Jews in the Torah] that life is for life, and eye for eye, and nose for nose, and ear for ear, and tooth for tooth,

> and retaliation for wounds. But he who grants a pardon, it shall be an expiation for him. If any fail to judge by [the light of] what God has revealed, they are the transgressors. (al-Māʾidah, 5:47)

وَكَتَبْنَا عَلَيْهِمْ فِيهَآ أَنَّ ٱلنَّفْسَ بِٱلنَّفْسِ وَٱلْعَيْنَ بِٱلْعَيْنِ وَٱلْأَنفَ بِٱلْأَنفِ وَٱلْأُذُنَ بِٱلْأُذُنِ وَٱلسِّنَّ بِٱلسِّنِّ وَٱلْجُرُوحَ قِصَاصٌ ۚ فَمَن تَصَدَّقَ بِهِۦ فَهُوَ كَفَّارَةٌ لَّهُ ۚ وَمَن لَّمْ يَحْكُم بِمَآ أَنزَلَ ٱللَّهُ فَأُو۟لَٰٓئِكَ هُمُ ٱلظَّٰلِمُونَ

The Qur'an has thus upheld the rulings of the previous revelations on this subject. Jewish law provided for retaliation but not for blood money, whereas Christianity emphasised the latter and Islam validated both. The purpose in all of these has been to limit the punishment and also to curb vindictive violence, which was rife in pre-Islamic Arabia.[1] Retaliation in pre-Islamic times often exceeded the limits of equivalence, and it was also not personal but a collective revenge exacted on the group or tribe of the offender.

Discriminatory practices in homicide were also encountered among the Jews. The renowned Companion Ibn ʿAbbās has thus reported concerning the two Jewish tribes of Medina, Banū al-Naḍīr and Banū Qurayẓah, that the former discriminated against the latter. When a man of Banū Qurayẓah killed one of Banū al-Naḍīr, the latter would retaliate by killing a member of Banū Qurayẓah, but if a member of Banū al-Naḍīr killed one of Banū Qurayẓah, the former gave in compensation one hundred *wasaqs* (camel load) of dates. On one such occasion when a man of Banū al-Naḍīr had killed someone of the Banū Qurayẓah, the latter brought the case for adjudication to the Prophet. It was concerning this case that the Qur'anic verse was revealed addressing the Prophet:

> And if they [non-Muslims] ask you to adjudicate, then judge among them with justice (*bi'l-qisṭ*). For God loves those who do justice. (al-Māʾidah, 5:42)

وإن حكمت فاحكم بينهم بالقسط، إن الله يحب المقسطين.

It is stated in a hadith that *bi'l-qisṭ* in this context means life for life, that is, just retaliation without any discrimination.[2]

والقسط النفس بالنفس.

Ibn Taymiyyah has explained that, driven by revenge, the family or tribe of the deceased would kill not only the killer but also one or more of his family members and often went on to kill many persons, such as the tribal

chief or group leader. Just as the killer acted out of aggression in killing his victim, the latter's family would go to excess in taking revenge. This would lead to continued hostility and a thirst for revenge killings on both sides.[3] Blood money, or *diya*, was also practiced in pre-Islamic times. Like retaliation, it too was not limited by the rules of equivalence and represented the least preferred option. People in those times considered it a compromise of personal and tribal honour to settle murder disputes by way of reconciliation (*ṣulḥ*) or payment of blood money. They would rather "wash blood with blood"; women would often taunt persons who attempted peaceful methods, and even pre-Islamic poetry recorded these practices in such terms.[4]

The Qur'anic reform on retaliation was marked by making it exclusively of concern to the person of the offender and could no longer involve anyone else, including his family, clan, or tribe. The rules of equivalence that characterised the Qur'anic *qiṣāṣ* also disregard the status and personal standing of the killer or the victim. Then there was a fresh emphasis on the element of intention, which was not always the case previously. Retaliation became due only for intentional killing or bodily injury. Blood money, which was basically optional in pre-Islamic times, also became an integral part of the Islamic law of homicide, with reference especially to unintentional killing and bodily injuries.[5] "Life for life" thus became the essence of equivalence in retaliation regardless of any factors of discrimination, and it makes no difference whether the victim is an adult or a child, insane, elderly or ill, man or woman, Muslim or non-Muslim.[6] Scholastic jurisprudence has, however, added details not always in tune with the Qur'anic spirit of this principle. Thus we read that according to Imams Mālik and al-Shāfiʿī, a Muslim may not be executed for killing a non-Muslim, based apparently on a hadith, which says just that: "A Muslim is not killed for killing a non-Muslim." The Ḥanafīs have disagreed and upheld instead the Qur'anic mandate of equivalence in the verse under review. They have understood the hadith just quoted to be applicable to a belligerent non-Muslim (*ḥarbī*) who is at war with the Muslims.[7] Muḥammad al-Ghazālī (d. 1416/1996) and his commentator, Yūsuf al-Qaraḍāwī (b. 1344/1926), have held that the hadith is a solitary (*aḥad*) hadith and cannot, therefore, override the Qur'anic textual ruling on the subject. Equality in the right of life also bears harmony with the rest of shariah. Al-Ghazālī further wrote that earlier scholars preceding Imam Abū Ḥanīfah, including al-Shaʿbī and al-Nakhaʿī, held the same view as that of Imam Abū Ḥanīfah.[8]

An exception to the rule of retaliation is made, under both the Sunni and Shii laws, when the father kills his own son, intentionally or otherwise. In this case there would be no retaliation but instead there may be a deterrent punishment (*taʿzīr*). If there are several culprits and one of them is exempted from retaliation, the rest are also exonerated from it, although they may still be punished and given deterrent sentences under *taʿzīr*.

Furthermore, the Qur'an permits retaliation in certain types of bodily injuries. If a person wilfully cuts off the hand of another, his hand is to be cut off in retaliation, and if a person strikes out the tooth of another, he is also liable to retaliation. But *qiṣāṣ* may not be inflicted in the case of breaking any other bone except for the teeth, for it is sometimes next to impossible to observe equality in other fractures. *Qiṣāṣ* for parts of the body also holds between a Muslim and a non-Muslim, both being equal as human beings with respect to the consequences of their offences. There is a degree of emphasis in both the Qur'an and the hadith on how the parties to retaliation and blood money should consider forgiveness at every opportunity that arises. Thus according to a hadith on the authority of Anas b. Mālik, "As far as I have observed, no case of retaliation came before the Prophet wherein he did not direct grant of forgiveness."[9]

ما رأيت النبي صلى الله عليه وسلم رفع إليه شيئ فيه قصاص إلا أمر فيه العفو.

In another hadith on the authority of Abū Hurayrah:

> When a man grants pardon (to an act of injustice he suffered) God Most High increases him in honour.[10]

ما زاد الله عبدا بعفو إلا عزا.

In yet another hadith, the Prophet has given the following instruction:

> The slain (or his family) has a choice of two things, either to take blood money or to retaliate.[11]

ومن قتل له قتيل فهو بخير النظرين إما أن يودي وإما أن يقاد.

Thus, it is either retaliation or blood money in the sense of one or the other, but the two do not combine in the same case, especially when the family of the deceased has granted a pardon or waived their right to retaliation and opted for blood money.

"Life for life," although occurring in the singular, also subsumes the killing of one person by a group of persons. A certain debate arose over the correct understanding of this Qur'anic phrase during the time of ʿUmar b. al-Khaṭṭāb concerning brutal murder of a person by a group in Yemen. Having investigated the matter, the caliph declared that people's lives could not be protected unless all the perpetrators were duly executed, and this became a standard ruling that is also upheld by the leading schools of law, both Sunni and Shia. The fourth caliph, ʿAlī b. Abū Ṭalib, is also reported to have executed three persons who had colluded in the murder of a man, and the position has consequently been upheld by general consensus.

As for the situation where one person kills two people, and each one presents a case for retaliation—if the relatives on both sides also demand retaliation—this will be carried out. But if both sides grant forgiveness, each will be entitled to blood money if they demand it. This is the position also in Shii law. However, if one forgives and the other demands retaliation, according to the Imams al-Shāfiʿī and Ibn Ḥanbal, blood money is payable for one who forgave and retaliation for the other, whereas Abū Ḥanīfah and Mālik maintain that the stronger of the two punishments will prevail, which means retaliation only and no entitlement to blood money. Shii law maintains that grant of forgiveness by some suspends retaliation, and others who do not grant forgiveness can only have a share in the blood money.[12] The Qur'an underscores the rationale of the law of retaliation in the verse: "And there is life for you in retaliation, O people of understanding" (al-Baqarah, 2:179).

وَلَكُمْ فِى ٱلْقِصَاصِ حَيَوٰةٌ يَـٰٓأُو۟لِى ٱلْأَلْبَـٰبِ لَعَلَّكُمْ تَتَّقُونَ

Retaliation saves lives in that it is a deterrent for others and also curbs vendettas and unwarranted continuation of hostilities. There is further instruction in the Qur'an (2:178–179) and the hadith that, once the law of *qiṣāṣ* is applied, the victim's family must cease hostility. They are strongly advised also in the same sources to grant pardon, or if they wish they may take blood money instead. The relatives of the deceased may, on the other hand, choose to forgo the blood money altogether, as it is their right, not an obligation; they are in fact encouraged not to punish but to forgive.

In another hadith on the subject, it is provided that the victim of bodily injury himself, or in the event of his death his legal heirs, may take one of the following three options:

> One who is victim of death or injury has one of the three options, and if he opts for a fourth, he must be grabbed by the hand [and stopped]: To retaliate, or forgive, or take blood money. One who does other than these indulges into excess and will suffer the torment of Hell forever.[13]
>
> من أصيب بدم أو خيل فهو بالخيار بين إحدى ثلاث: فإن أراد الرابعة
> فخذوا على يديه: بين أن يقتص أو أم يعفو، فإن أخذ من ذلك شيئا
> ثم عدا بعد ذلك فله النار خالدا فيها مخلدا أبداً".

Ibn Taymiyyah has quoted this and commented that the warning of this hadith is particularly concerned with pursuit of revenge after grant of pardon or acceptance of blood money. As soon as one of the available options is exercised, all hostility must cease as of that moment.[14]

As a general rule, the death of the offender himself extinguishes all claims. The rules of retaliation also provide that it must be carried out in the least painful manner. If the offender is a minor or insane there shall be no retaliation, but only blood money, which, according to the majority of Sunni jurists, as well as the Shia Imamiyyah, would be payable by the family or agnatic relative (*ʿaqīlah*) of the offender. Others maintain that a minor or or insane person is not liable to blood money either.[15]

The personalised features of *qiṣāṣ* law in the Qur'an and the fact that the next of kin (*walī al-dam*) of the deceased has been given a say in the execution of *qiṣāṣ* is a function partly of the phenomenon of graduality (*tanjīm*) in the Qur'anic legislation, a phenomenon that has also been seen in all the other *ḥudūd* punishments.[16] For these were mostly introduced gradually, and each of the *ḥudūd* crimes with respect, for instance, to drinking, adultery, and slander were also prohibited through gradual and successive instances of legislation over a period of time. The gradualist approach in the *ḥudūd* legislation was meant to avoid inflicting hardship on people through sudden changes in some of the most entrenched aspects of pre-Islamic practices. Retaliation was definitely one of them.

In pre-Islamic Arabia, the next of kin would retaliate against anyone from the family or tribe of the offender. Islam also empowered the next of kin of the murder victim with a say in the matter of *qiṣāṣ*, but it stipulated it in several other ways, which effectively meant that *qiṣāṣ* was henceforth to be administered by the state and under its close supervision. Thus the Qur'an passage that gives the next of kin a say in retaliation is immediately followed by an address to the Muslim community and the Prophet to "let

him not exceed the bounds in the matter of taking life. For he is helped [by the law]" (al-Isrāʾ, 17:33).

فَلَا يُسْرِف فِّى ٱلْقَتْلِ ۖ إِنَّهُۥ كَانَ مَنصُورًا ۝

This clearly means that only the killer is executed and no one else, but also that it is done under the Prophet's own supervision. For leaving the execution aspect also to the next of kin to control the process would corrupt the meaning of the text. The renowned Qur'an commentators—Ibn Jarīr al-Ṭabarī, Abū Bakr al-Qurṭubī, and Jalāl al-Dīn al-Suyūṭī, authors of *Tafsīr al-Ṭabarī, Tafsīr al-Qurṭubī,* and *Tafsīr al-Jalalayn,* respectively, as well as the latter's commentator in *Ḥāshiyat al-Ṣāwī*—have all held that whenever hostile intentional killing is proven, the lawful ruler (*al-hakīm al-sharʿī*) enables the next of kin of the deceased by offering him the option of whether to carry out retaliation, grant forgiveness, or take blood money. "But the next of kin is not allowed to deal directly with the killer, for that will cause corruption and distortion to proliferate." The state control over the process of retaliation is further endorsed by the fact that even when the next of kin of the deceased grants forgiveness to the killer, the state is still entitled to punish the latter in order to protect the public interest—as is elaborated in the following section.[17]

In al-Ṣāwī's view, today's conditions necessitate that the next of kin (or the crime victim) are prohibited from executing *qiṣāṣ* in the old way. Rather, this should be the task of state enforcement agencies and those who are knowledgeable. The next of kin should only be asked for permission whether they allow and wish *qiṣāṣ* to be carried out or if they choose to grant forgiveness. If the latter, there will be no *qiṣāṣ* punishment. This is a privilege that shariah has granted to the next of kin of the victim, but it is confined to killing and does not apply to bodily injuries, and then only to asking for permission. The next of kin is, in other words, not asked for permission in bodily injuries.[18]

The state also plays a similar role regarding the person who is convicted of intentional bodily injury. If not subjected to retaliation for some reason, or even when he pays monetary compensation (*diya*) of limbs, he may still be punished with a suitable punishment by the state in order to protect the society against criminality and violence. In sum, a grant of forgiveness by the next of kin of the deceased does not affect the public right aspect and the authority of the state to impose additional punishments of flogging and imprisonment. This is the position, it is further added, of

Imam Mālik, representing also the practice of the Medinans (*ʿamāl ahl al-Madīnah*) and also the precedent of the second caliph ʿUmar b. al-Khaṭṭāb on this matter.[19]

Bahnasī quotes Imam Mālik's *al-Muwaṭṭaʾ* and the Mālikī jurist al-Dusūqī (in *Ḥāshiyat al-Dusūqī ʿalā l-Sharḥ al-Kabīr*), regarding the person who is convicted of deliberate killing but exonerated by the next of kin of the deceased, the state may still punish him with 100 lashes of the whip and banishment for one year.[20] This was seen as a suitable punishment at the time, as Abū Zahrah has pointed out, but the basic idea is that the government is within its rights to punish the culprit under the principle of *taʿzīr*, which is not limited to the Mālikī specifications but may take into consideration the prevailing conditions of the time and gravity of the offence. The punishment may be imprisonment for a limited period or a long time, even life imprisonment.[21]

Giving the next of kin of the deceased the right to forgive is a Qur'anic dispensation, as in the verse: "An alleviation from your Lord and a mercy from Him, but anyone who becomes aggressive after that shall bring upon himself a painful chastisement" (al-Baqarah, 2:178).

ذَٰلِكَ تَخۡفِيفٞ مِّن رَّبِّكُمۡ وَرَحۡمَةٞۗ فَمَنِ ٱعۡتَدَىٰ بَعۡدَ ذَٰلِكَ فَلَهُۥ عَذَابٌ أَلِيمٞ

This is an alleviation and relief in particularly stressful situations that would otherwise inflict severity and hardship. Imagine when someone kills his own brother, and the next of kin in this case is the father, who has no other son. He would be in an unfortunate situation of having to lose both his sons, and the possibility of forgiveness may offer a much preferable option. Having given this illustration, Abū Zahrah goes on to make the point that the Prophet encouraged forgiveness only when it seemed preferable and appropriate, but he was firm not to offer it in brutal murder cases where forgiveness would have no place. This is illustrated by the well-known case of a Jewish man who had killed his female slave by placing her head between two rocks and crushing her to death, showing extreme callousness.[22] The case was brought to the Prophet, who ordered retaliation in the like manner and it was carried out. This, it is added, was also the occasion of revelation of the Qur'anic verse, as already quoted, "And there is life for you in [the law of] *qiṣāṣ*, O people of understanding" (2:179).

The Qur'an leaves little doubt, Bahnasī continues, on the public rights aspect of intentional homicide due to the extreme gravity of this crime.

This is reflected in many places in the text, including the verse: "One who kills another human being without the latter being guilty of murder and corruption in the land, it would be as if he has killed the whole of mankind" (al-Mā'idah, 5:32).

مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِى ٱلْأَرْضِ فَكَأَنَّمَا قَتَلَ ٱلنَّاسَ جَمِيعًا.

The verse continues immediately to provide further that "one who gives life to one person, it would be as if he gives life to the whole of mankind."[23] Quoting this verse, Fazlur Rahman wrote that it "explicitly makes the crime of murder a crime against humanity. Now a legal solution could have been derived from this general statement, but this was never done."[24] Based on his overall reading of the Qur'anic evidence on *qiṣāṣ*, Bahnasī wrote: "It is a common misconception then and evidently erroneous to say that *qiṣāṣ* is a private punishment in Islam." Yet the misconception has taken hold, he adds on the same page, and has persisted notwithstanding the repeated Qur'anic designation of murder and slaying of innocent blood as the greatest of all *ḥarām* known to the Islamic scriptural sources. *Ḥarām* is not a private concept in shariah, especially in this particular context—hence the assertion that *qiṣāṣ* is a private crime/punishment is hardly justified.

Questions have arisen as to who is the rightful next of kin, or the legal prosecutor, to grant forgiveness or demand retaliation. In the event where there is only one person who is next of kin, he or she would have the right either to choose retaliation or to forgive, but issues arise when there are many members in the family. The Ẓāhirī school maintains that the right of prosecution belongs to all the relatives, be they male, female, agnates, or nonagnates and whether or not they are entitled to inheritance from the deceased. This is the widest view of all the schools on record with the underlying concern evidently that the blood of a slain person should never go unclaimed, even if it concerns a remote relative. Any relative that decides to prosecute for *qiṣāṣ* is therefore entitled to do so. The majority of schools (*jumhūr*), except for the Mālikīs, hold that the prosecutors are the victim's legal heirs at the time of his death, regardless of their sex and the grounds of their entitlement to inheritance, whether through blood tie, agnatic tie, or marriage. Only the Shāfiʿīs and Shia exclude the spouse relict from the right to prosecute for retaliation. Mālikī law is different from the other schools in that it gives priority to male agnatic relatives who must demand retaliation or grant forgiveness.[25] Having compared the views of the leading schools of fiqh, Abū Zahrah prefers, and rightly so, the Ẓāhirī

position that entitles all the relatives who are hurt by the killing of the deceased to initiate the retaliation claim. This view, he says, is not all that different from the position of Imam Aḥmad Ibn Ḥanbal and even the Ḥanafī school, who virtually include all the legal heirs in all categories of relationships to the deceased person.[26]

Disagreement has arisen, however, when some of the relatives choose retaliation and others decide to forgive, and also when the relatives include minor persons, when some of the relatives happen to be absent, or when the killer has died. The Ḥanafī, Mālikī, and Shii schools entitle the next of kin either to demand retaliation or to forfeit this right, thereby pardoning the killer. They cannot claim blood money or any other financial consideration without the agreement of the killer. The other schools are of the opinion that the prosecutors may demand retaliation, decide to pardon the culprit, or demand blood money. The implications of the difference become clear if the murderer dies before his execution. In Shāfiʿī, Ḥanbalī, and Shii law, the victim's next of kin can still demand the blood money from the murderer's legal heirs, whereas according to the other schools, the victim's next of kin have lost their rights as a result of the killer's death.[27]

Imams Abū Ḥanīfah, al-Shāfiʿī, and Ibn Ḥanbal, and also the Shia Imamiyyah, have held that forgiveness by only some of the relatives overrules retaliation altogether, as one of the conditions of retaliation is that it is demanded by all the relatives. If some grant forgiveness and others do not, this creates an element of doubt and doubt suspends *qiṣāṣ*, as is also the case with regard to other *ḥudūd* penalties. In a real scenario that arose during the time of the second caliph ʿUmar b. al-Khaṭṭāb, the relatives of a murder victim demanded retaliation, and it was at this time when the sister of the deceased, who was also the wife of the murderer, turned up and said that, as far as she was concerned, she forgave her husband. Upon hearing this, the caliph decided to suspend the retaliation. This case also serves to illustrate the value of forgiveness: the woman lost her brother and was now about to lose her husband, were it not for the possibility of forgiveness to prevent that from happening. In the event where the relatives of the deceased include a minor person, many have held that his or her legal guardian should make a decision that is to the minor's advantage. For instance, they may decide to grant forgiveness in consideration of blood money should the minor be in need of financial support. In Mālikī law, the issue does not arise in the first place, as this law only entitles adult relatives to have a say in the matter.[28]

There is some disagreement on the manner in which retaliation is enforced. Whereas many have suggested a reciprocal method of executing the murderer in the way he killed his victim, the preferred view is that it should be done by decapitation with a sword that is supervised by the authorities. Most jurists, including the Shia Imamiyyah, have concurred on the use of the sword as this was deemed to be swift in view of the fact that shariah did not validate maiming and torture. Since the purpose is to apply a swift and clean method, there should, in principle, be no objection from the viewpoint of shariah to other methods that are now available, such as lethal injection, shooting, the electric chair, and the like that may be even faster and more efficient. With regard to retaliation in bodily injuries, most jurists, both Sunni and Shia, stipulate that it should not be carried out in extremely hot or cold weather and rather should take place in moderate conditions.

For *qiṣāṣ* to be implemented, legal capacity and intent to kill on the part of the killer and innocence (*ʿiṣmah*) of the victim must be proven. The victim is not, in other words, one whose life is not legally protected, such as an enemy warrior or a rebel. Attention is also paid to the motive of the crime, the whereabouts of the deceased's body, and the kind of instrument used: whether it was a lethal weapon or not. Uncertainty in the proof of these requirements is likely to reduce the charge of murder (*qatl al-ʿamd*) to quasi-intentional homicide (*qatl shibh al-ʿamd*).[29] Furthermore, retaliation proper applies to murder only, and it is not applicable to mitigated cases or manslaughter, which may involve mistakes or accidents, as the presence of these would preclude *qiṣāṣ*.

According to the majority opinion, excepting the Ḥanafīs, the offender in the cases both of retaliation and blood money is also liable to an expiation (*kaffārah*). Expiation in this case consists of the release of a slave (when this was possible—a suitable alternative may nowadays be to donate towards saving the life of a needy patient who requires a transplant or expensive operation), feeding sixty poor persons, or two months of fasting. The Ḥanafīs have held that expiation is only applicable to erroneous killings but not to cases where the murderer has been sentenced to retaliation (*qiṣāṣ*). Lastly, in the event of bodily injury and loss of limbs, Muslim jurists, including the Shia Imamiyyah, are in agreement that only the victim has the prerogative to grant forgiveness and no one else.[30]

Based on the foregoing analysis, this chapter proposes that the right of the legal heirs/next of kin to prosecute in murder cases should now be

confined to asking for permission only. From that point onwards, the law enforcement agencies take responsibility to ensure due process. Granting permission by the next of kin to prosecute is tantamount to their asking for *qiṣāṣ* prosecution to proceed. If the next of kin grant a pardon, or ask for blood money, the prosecution will make a record of these, and it will be for the court to evaluate these positions side by side with the prosecution claims over the public rights aspect of the case.

XVI

*Blood Money and Financial Compensation (*Diya*)*

DIYA IS A quantity of a valuable asset (*māl*) the shariah has assigned to be paid to the crime victim or his heirs by the perpetrator of a crime even if the latter has died. It is a part of the criminal law that resembles civil damages or compensation. Compensation (*taʿwīḍ*) is purely civil in nature, which is why the judge may determine its amount, but not so in *diya*, which is objectively determined. *Diya* also differs from *gharāmah*, which is a punishment pure and simple and is payable to the public treasury. *Diya* combines elements both of punishment and compensation. *Diya* is quantified at a standard amount by shariah that does not vary by reference to the offender's personality and status but does vary by reference to the type of crime and injury inflicted. That is why the *diya* of a child, an adult, the rich, or the poor are all the same, and so is the *diya* of man and woman, or Muslim and non-Muslim, according to contemporary *ijtihād*. This discussion takes a position that differs, as also does Tawfīq al-Shāwī, from the scholastic positions that differentiate between man and woman or Muslim and non-Muslim in this regard. For the normative position of shariah is the equality of all human beings with respect to their right to life. The level of objectivity in the essence of this right and also of essential human dignity are firm commitments that are not open to derogation and compromise.[1]

Whereas retaliation is the principal punishment for murder, payment of blood money (*diya*) is the principal punishment for unintentional killing and culpable homicide; the latter resembles murder and represents an intermediate category between intentional and unintentional killing. Blood money can also be paid in murder cases in which the relatives of the

victim waive their right to retaliation and choose to receive blood money. An intensified *diya* (*diya mughāllaẓah*) is payable to the heirs of the deceased in culpable homicide not amounting to murder. As a general rule, blood money is payable by the criminal himself or his legal heirs in the category of agnates (*ʿāqilah*).[2] Originally the *ʿāqilah* consisted of adult able-bodied tribesmen of the killer who had the duty to protect all members of their tribe. This is roughly the basis of the Mālikī, Ḥanbalī, and Shii definitions of *ʿāqilah*, in which it consists of all the agnatic male relatives of the killer.[3] The Ḥanafī concept of *ʿāqilah* widens its scope and holds that other groups may be included, like traders in the same market or colleagues in a workplace who could offer assistance and can be counted as a solidarity group. Al-Qaradawi makes this the basis of a fatwa to say that *ʿāqilah* today may be transferred to professional associations and unions, such as those of medical doctors, architects, and so forth. When a medical doctor kills someone by mistake, for example, his association may be considered as his *ʿāqilah* and pay the *diya* on his behalf.[4] If a person has no *ʿāqilah*, the public treasury bears the responsibility for payment of blood money.[5]

Grant of a pardon by the relatives exonerates the offender from *qiṣāṣ* even if the relatives accept blood money. This is the view of Imams al-Shāfiʿī and Ibn Ḥanbal, whereas Imam Abū Ḥanīfah has held that pardoning in *qiṣāṣ* means that the relatives do not take anything as this would be an act of goodwill and *iḥsān* on the part of the relatives within the meaning of the Qur'anic terms "*maʿrūf* and *iḥsān*" (2:178).[6]

Blood money is also applicable as a substitute for retaliation in cases where the requirements of the latter cannot be fulfilled. Furthermore, reconciliation between the parties is generally recommended before adjudication, although the community and state retain the right to impose a deterrent (*taʿzīr*) punishment even after reconciliation. The Imams Mālik and Abū Ḥanīfah have held that the state must impose a *taʿzīr* punishment in every case of intentional killing wherein neither retaliation nor blood money is imposed. Imams al-Shāfiʿī and Ibn Ḥanbal have held, however, that once the victim's relatives grant a pardon to a *qiṣāṣ* convict, he is exempt from all punishment. The other two Imams mention that although *taʿzīr* punishment is not compulsory in every case, it should be given when public interest demands it. However, *taʿzīr* in such cases must as a general rule be less than the death penalty.[7] *Diya* does not combine with a pardon in unintentional homicide in that a grant of pardon disallows the next of kin from demanding a *diya*.

Blood money for loss of life is determined at one hundred camels of roughly equal combinations of one, two, three, and four years of age. The monetary equivalent of this is cited, according to some reports, at eight hundred (gold) dinars or eight thousand (silver) dirhams. Later it is reported that, due to price rises, the caliph ʿUmar b. al-Khaṭṭāb raised these monetary equivalents to one thousand dinars and twelve thousand dirhams respectively. There arose some differences of opinion over the question as to which is the basic unit of value in determining the quantitative aspect of *diya*: is it camels or gold? Abū Zahrah's response to this question is that times have changed and camels are not found in all places, nor is their price commonly known as much as the prices for gold and silver. Hence gold has been made the unit of value for the evaluation of *diya*. To this it is added that, whenever feasible, one must maintain a comparative parity between the gold value of *diya* and its equivalent in camels.[8]

The details of blood money are determined mostly by the Sunnah, which, like the Qur'an, does not draw any distinction on the basis of gender and religion, yet juristic opinion of the fiqh scholars, in both the Sunni and Shii schools, has held the blood money of a woman at half that of a man, a distinction that has remained somewhat controversial. This is because the source evidence does not recognise any gender-based distinction; the Qur'an has in fact provided an egalitarian formula on the inherent value of human life. We may refer here to the combined account of Muḥammad al-Ghazālī and his commentator, Yūsuf al-Qaraḍāwī, on this issue. The latter has endorsed the former's position to the effect that "the *diya* of a woman is equal to that of a man, the reason being that the Qur'an has not differentiated between them. The assumption then that a woman's life is cheaper (*arkhās*) than that of man, or that her right is of a lesser value is a false assumption (*zaʿm kādhib*) and it is contrary to the noble Qur'an. A man who kills a woman is executed, just as is a woman who kills a man. Their blood is equal. Then what is the reason for inequality in their blood money (*diya*)?"[9] This is a clear example perhaps of how a medieval society's values have found their way into the fabric of scholastic jurisprudence and gained recognition over the course of time.

Qaradawi continues: "The Shaykh (al- Ghazālī) could have perhaps added the hadith that the blood money for loss of life is one hundred camels [في النفس مائة من الأبل] ", which shows that the Prophet did not differentiate the blood money of a man from that of a woman.[10] The claim that the *diya* of a woman is half that of a man refers to a hadith to that effect, but that hadith is unsound. It has a broken chain of transmitters (*isnad*) attributed to (and may be a statement of) the Companion Muʿādh b. Jabal.

Al-Bayhaqī wrote that its *isnad* is certainly unreliable and there is nothing to that effect in either al-Bukhārī or Muslim or their commentators. The claim over general consensus (*ijmāʿ*) in support of the alleged distinction is also weak. Al-Shawkānī has gone on record to say that at least two early scholars, Abū Bakr al-Asamm and Ibn ʿUlayyah, have opposed it. More recently, Muṣṭafā al-Zarqā and Muḥammad Abū Zahrah have also opposed the discriminatory position over blood money. The hadith does not differentiate in this regard between the blood money of "a man and that of a woman, nor between the blood money of Muslim and non-Muslim, nor even of a slave and a freeman."[11] Abū Zahrah has also looked into the details of the relevant juristic views and concluded by saying that they are weak and depart from the guidelines of the Qur'an and hadith. "We prefer therefore the position taken by Abū Bakr al-Asamm," which was taken at a time before these additional accretions were added on.[12] The Qur'an draws no distinction between one life and another, even if one is that of an infant and the other an adult in his prime, a great scholar (*ʿālim*) and a commoner, a man and a woman—all are equally subject to the laws of *qiṣāṣ* and *diya*.[13]

When the slain body of a person is found in a locality without any trace of the killer and all efforts fail to identify the killer, the state is responsible to pay blood money to the victim's family in lieu of its basic commitment and responsibility to protect the lives of its citizens.[14] The principle of blood money (*diya*) finds analogous expression in contemporary criminology, which often recommends decriminalisation of certain acts and recourse to victim compensation as an alternative to imprisonment. *Diya* is, however, not totally analogous to civil damages. This is because *diya* has a punitive component that gives it certain characteristics of its own. It is akin to the imposition of a fine for a particular crime with the proviso perhaps that, in the case of *diya*, the fine goes to the victim's family rather than to the state. The rules of *diya* also permit the state to stand as a substitute, if need be, for the victim's family in order to secure the *diya* from the perpetrator and provide the victim or his family with appropriate compensation. Thus it is not necessary for *diya* always to be paid directly to the victim or his family. It can be paid to the state in the form of a fine provided that the state assumes responsibility for being able to satisfy the needs of the victim's family.[15]

If the offender himself can pay the *diya*, he is responsible to pay it in the first place as the agnatic group (*ʿāqilah*) comes in only to help with the payment when the offender is unable to pay. This is also implied in the

Qur'anic text on the subject of *diya* (i.e., al-Nisāʾ, 4:92). Since this verse does not make any reference to *ʿāqilah*, it is understood that *diya* is payable by the offender himself. The *ʿāqilah* provision in Islamic law represented a departure from the basic principle of personal responsibility of the offender on grounds of introducing a level of cooperation in unintentional crime. The purpose was also to make security and crime prevention a concern directly of the family and tribe. During the time of the second caliph, ʿUmar b. al-Khaṭṭāb, the colleagues at the workplace of the offender (*ahl al-dīwān*) were included in his *ʿāqilah*, and this marked an early shift in the composition of *ʿāqilah*, a provision that was altogether characteristic of the tribal society and its particular set of conditions.[16]

In response to a question whether the rules of the agnatic group (*ʿāqilah*) can be meaningfully applied at the present time, it may be difficult to apply them now, not only because of the weaker tribal ties but also because of a certain tension that exists between the rules of *ʿāqilah* and the constitutional principle of legality in crimes and punishments. In this connection, the former Rector of al-Azhar, Maḥmūd Shaltūt, has rightly observed, and has quoted Ibn ʿĀbidīn al-Shāmī in support of his own view, that the *ʿāqilah* provision in the Sunnah represented temporary legislation (*tashrīʿ zamānī*) that was meaningful within the tribal setting of earlier times but that no longer obtains.[17] One may also add that even though the *ʿāqilah* provision is no longer applicable, the basic idea of payment of some kind of financial compensation to the family of the victim in traffic accidents and certain crimes of violence still holds good. The offender himself should be required to pay the whole of the *diya*, and failing that, it should wholly or partially be the responsibility of the state. In the event where the offender can pay a part of the *diya*, the state may bear responsibility for the rest. Pension regulations, especially relating to the state pension and the question of the deceased person's entitlement to a state pension, Islamic insurance (*takāful*), or life and disability insurance, are some of the additional new factors that are likely to be taken into consideration by the court in the determination of *diya* or its equivalent in compensation for crime.

There is another provision in the Sunnah, as already mentioned, concerning homicide in obscure circumstances, or when a dead body is found in a locality and the case cannot be solved even after strenuous efforts to find the killer. Recourse may be had in that situation to the principle of *qasamah* (oath-taking) applied to all the people who might be suspected in the incident or who live in the vicinity. Fifty men of the nearest locality, town, or village, which may be identified by the family of the deceased,

must take solemn oaths that they have neither killed nor have any knowledge of the killer. When they all take such oaths, they are all absolved of *qiṣāṣ* but they are still collectively liable to pay a *diya* to the family of the deceased for their negligence to ensure safety within the area under their supervision and control.[18]

Qasamah (oath-taking) is premised on the rationale that shariah does not accept the notion of human bloodshed in vain (*hadr al-dam*) nor of a killing for which no one is held accountable. Basic authority for *qasamah* is provided in a long hadith, narrated by Ziyad b. Abi Maryam, that may be summarised as follows:

> A man came to the Prophet, pbuh, and informed him that he found the dead body of his brother amidst such and such a tribe. The Prophet told him to bring together fifty persons from among them who must swear by God that they have neither killed nor known the killer. The man then asked if this was all that was to be done, to which the Prophet replied that he was also entitled to one hundred camels [as *diya*].[19]

Even when the parties reach an agreement to convert *qiṣāṣ* into the payment of blood money, the authorities remain entitled to impose a punishment on the offender. For payment of blood money only settles the Right of Man aspect of the crime, whereas crimes of violence are also crimes against the society, which is represented by the state, and may as such grant pardon or impose a punishment if it deems this to be in the public interest (*maṣlaḥah*).[20]

Retaliation and Blood Money in Modern Law: An Overview

With reference to its contemporary applications, it may be noted that the right to blood money has been utilised in Saudi Arabia where the state plays an increasingly prominent role in cases of murder, assault, and damage to property. In the interest of public order and internal security, "the state is not content with private settlement of disputes through the payment of blood money. Although in shariah payment of blood money is preferable to retaliation as a way of settling disputes, as it is inclined toward clemency, it is no longer sufficient to terminate a dispute (through payment

of *diya*) and the assailant is therefore held liable to a state-imposed sanction."[21] It is also prescribed by the traffic regulations of Saudi Arabia that someone who knocks down and kills a person in a traffic accident shall be liable to pay *diya* to his legal heirs and, in addition, be liable to imprisonment. The blood money payable for a woman's accidental death is half as much as that of a man.[22]

One or two points of general interest may briefly be made here, one of which is that *diya*, whether for loss of life or loss of a limb, should not be seen as putting a price tag on human life and limbs. It is concerned mainly with the plight of the family that has suffered, including their potential loss of income and other factors. The purpose of *diya* in the Qur'an is after all alleviation of suffering and a show of compassion, not a rigid imposition that is unrelated to the surrounding conditions of the offence and its victim. Another point that may have a bearing on the assessment of a suitable *diya* in our times would be to refer to the prevailing general customs and conditions of employment, the cost of living, insurance indicators and so on.

The shariah provisions on *diya* that are applied in Saudi Arabia raise questions over certain factors that play a role in the implementation aspect of the law, such as the value of money in cases of involvement of people from other countries, changes in the exchange rate of currency, and the desire to curb excessive demand for blood money. Blood money for non-Muslims in Saudi Arabia has been equated with that for Muslims. A combination of statutory legislation and Islamic criminal law is also applied with regard to labour relations and motor vehicles. The rates of compensation for work accidents are fixed by a special committee, which on the whole relies on Islamic law guidelines. In motor vehicle accidents, the police determine the guilty parties, while the shariah court fixes the amount of the blood money.[23]

As explained earlier, for reasons of utility and pressing circumstances, classical fiqh doctrines grant the ruler extensive powers to exercise judicious policy or *siyāsah*. In Saudi Arabia, the king still uses this power. He pronounces *siyāsah*-based sentences in cases of urgent public necessity if the proof of guilt is overwhelming and if normal processes of justice seem too gradual to meet the urgency of a situation. A formal trial will not be required, but prior to issuing a policy-based sentence, the king will instruct a shariah court to establish the facts of the case or consult senior ulama. A typical case for a *siyāsah*-based judgment may be where a man kills his child, since a parent may not experience retaliation for killing his or her

child. A sentence of this kind utilises the combined resources of both deterrent punishment and judicious policy (*taʿzīr* and *siyāsah*). The king's approval is also required prior to execution of all death sentences in Saudi Arabia.[24]

In 2001 the Saudi government enacted a code of criminal procedure in 225 articles. An important principle of this law is that no punishment can be inflicted except for crimes prohibited by shariah and Saudi regulations, based on a final judgment issued after due process. This code prohibits torture during criminal investigations and gives the accused the right to a lawyer. The Saudi justice system has thus been undergoing reform that integrates the requirements of due process and pays attention also to the constitutional law principles of legality in crimes and punishments.[25]

An instance of the application of *qiṣāṣ* law in Saudi Arabia was the Gilford case, which gained international publicity at the time. Frank Gilford from South Australia had to decide whether to insist on death by *qiṣāṣ* or to accept blood money (*diya*) in connection with the death of his sister, Yvonne Gilford. The case was tried in Riyadh, where two nurses were charged with killing the deceased. In the end, the brother of the deceased chose to accept *diya,* which he in turn donated to a hospital in the memory of his sister.

Another case of conversion of *qiṣāṣ* to *diya* was that of Sarah Balabagan in 1995. A fifteen-year-old Muslim from the Philippines was sentenced to death by *qiṣāṣ* in the United Arab Emirates. She was found guilty of killing her employer, Almas Mohammed al-Baloushi, by stabbing him thirty-four times. She pleaded self-defence as the employer had tried to rape her. The trial court had earlier confirmed that Balabagan was the victim of rape, but she was also found guilty of manslaughter. She was sentenced to seven years of imprisonment and was ordered to pay 150,000 dirhams to the victim's relatives. The sentence was contested and appealed, and the appeal court imposed the death sentence by firing squad. The Philippines authorities intervened, and later the victim's family was persuaded to grant a pardon from *qiṣāṣ* and instead accepted the 150,000 dirhams as *diya*. Balabagan's sentence was also reduced to one year of imprisonment and 100 lashes.[26]

Iran and Pakistan have also adopted the shariah provisions on *qiṣāṣ* and *diya* in their respective laws. The Iranian Law of *Ḥudūd* and *Qiṣāṣ* 1982 (sections 62–68) and also the Law of Taʿzīr 1983 regulated *ḥudūd, taʿzīr, qiṣāṣ, diya*, and *kaffārah* in accordance with the Shia Imamiyyah School and

thus almost codified the law with respect of the offences of murder, homicide, bodily injury, sexual offences, and offences against property such as theft and robbery. These laws were later revised and partially amended in 1996. The amended laws, which were approved by Parliament, tend to emphasise accuracy in the enforcement of *qiṣāṣ* so that the victim is not exposed to pain in excess of what is proportionate and equivalent to his or her offence. Retaliation (*qiṣāṣ*) under Iranian law may not be implemented in conditions where inflicting injury is likely to become infectious.[27]

It is of interest to note that *qiṣāṣ* gained considerable attention and coverage in the Western media in 2009 when Ameneh Bahrami, an Iranian woman, was blinded in an acid attack. Since Islamic law enables the victim to demand retaliation or grant pardon, Bahrami demanded that her attacker be blinded as well. Thus it appeared that the victim had the ability, under Iranian law, to pardon the perpetrator and withhold punishment even in cases of both murder and bodily injury. Bahrami pardoned her attacker and stopped his punishment (drops of acid in his eyes) just before it was to be administered in 2011.[28]

With regard to the law of homicide, a judge who pronounces a sentence of retaliation may allow one of the prosecutors to carry out the execution. Somewhat like Saudi Arabia, the Iranian law had also retained, however, the disputed fiqh provision that specified the woman's blood money at an amount that was half of the blood money of a Muslim man. This half of a *diya* has been determined at 75 million riyals (equivalent to 7,750 Euros). However, when in 2003 such a case arose, the state offered to pay part of this sum. A few months before then, at the instigation of some of the female members of Parliament, a draft law was passed to abolish this difference in blood money. However, the Council of Guardians was reported to have declined its approval. The campaign for eliminating the difference in the blood money of women as well as non-Muslims continued for some time.[29]

In Pakistan, the Criminal Laws (Amendment) Ordinance 1991 amended the Penal Code and the Criminal Procedure Code to enable *qiṣāṣ* and *diya* to be applied. The punishments of *qiṣāṣ, diya*, and *arṣh* (compensation for injury) are added to the scale of punishments provided in the codes. The offences of murder and bodily injuries can be compounded with *ṣulḥ* or mutual agreement and can be settled by payment of *diya* or *arṣh*. Because of this, even intentional murder is not liable to the mandatory sentence of death. Homicide that is caused by negligence or accident is liable only to the payment of *diya, arṣh*, or *taʿzīr* punishment. Offences of bodily injury

are also dealt with by these methods. Some offences are thus treated both as crimes and as torts. But the position here differs with civil law in that *diya* and *arsh* are mainly determined by law and not by the assessment of the court.[30]

These amendments were the result of a decision made by the Shariat Bench of the Supreme Court which determined that the law of homicide under the Pakistan Penal Code 1860 was not in accordance with the Islamic law and therefore was null and void.[31] A bill to remedy this, based on the Ḥanafī doctrine, was published in 1981, which generated much public debate especially on account of provisions that barred female testimony in *qiṣāṣ* cases and took the position that the blood money of a woman was half that of a man. Issues remained unresolved and clear positions remained difficult to ascertain due partly to political changes and indecision. Civil societies and women's groups later resumed their egalitarian campaign during General Musharraf's rule, and the federal shariah court also tended to exercise a moderating influence in the application of *ḥudūd* laws.[32]

In the Sudan a number of laws were enacted in the late 1980s with a view to bringing the country's laws in conformity with shariah and amending or enhancing some of the existing laws. Included in these were the Penal Code 1983 and Criminal Procedure Code 1983. The Penal Code went into force on 8 September 1983 and introduced the *ḥudūd* and *qiṣāṣ* laws. The Criminal Procedure Code regulated criminal investigations, prosecution, and trials in conformity with shariah.[33] Further details on Sudan and some other countries can be found in part three of this book.

Shariah penal codes in Northern Nigeria, including Zamfara and Kano, follow the classical Mālikī doctrine on homicide and bodily injuries. Some codes specify that the killer can be sentenced to be executed in the same way as he killed his victim. As in Mālikī law, heinous murder (*qatl al-ghīlah*), defined as "the act of luring a person to a secluded place and killing him" (Art. 50, Zamfara Shariah Penal Code), is a capital offence for which the position of the prosecutors is also irrelevant. The reintroduction of Islamic criminal law in Northern Nigeria is burdened, however, by political and legal complications, and it is likely to remain a bone of contention between the Muslim North and the rest of Nigeria. One of the major legal problems is that the shariah penal codes are on several points at variance with the federal constitution of Nigeria.[34] A somewhat similar scenario also obtains in Malaysia as explained in the following section.

In Malaysia, two of its northern provinces, Kelantan and Terengganu, have proposed to enforce the *ḥudūd, qiṣāṣ*, and *diya* laws in their respective Enactments. The Shariah Criminal Code (II) 1993 of Kelantan deals with *qiṣāṣ* offences in part II (sections 24–38) and makes wilful killing (*qatl al-ʿamd*) punishable with death by *qiṣāṣ* if the next of kin does not grant a pardon; but if a pardon is granted, and the heir/prosecutor opts for *diya*, it will be payable to the victim's relative or in some cases the offence may be punished by *taʿzīr*. The bill also makes provisions on bodily injuries and specifies circumstances where *qiṣāṣ* may or may not be enforced. It also addresses issues of proof and evidence in part II (see Appendix at end of this book). The attached schedules II and III to this bill specify the types of injuries and the amounts of blood money (*diya*) or compensation for bodily injury (*arṣh*) that they carry.

Section 28 of the Hudud Bill of Kelantan thus provides:

> The *wali* (guardian, next of kin) may at any time before the punishment of death as the *qiṣāṣ* punishment is executed, pardon the offender either with or without a *diya*; and if the pardon is with a *diya,* this shall be paid either in a lump sum or by installments, within a period of three years from the date of final judgment, and if in the meantime the offender dies, the *diya* shall be recoverable from his estate.

Section 35 provides:

> Whoever causes bodily injury to a person shall be punished with *qiṣāṣ* punishment, that is, with similar bodily injury as that which he has inflicted upon his victim, and where *qiṣāṣ* punishment cannot be imposed or executed because the conditions required by the shariah law are not fulfilled, the offender shall pay *irsh* to his victim and may be liable to a *taʿzīr* punishment by imprisonment.

Terengganu introduced its Shariah Criminal Enactment on *Hudud* and *Qisas* 2002 in seventy-four sections, which has closely followed the provisions of the Hudud Bill of Kelantan. Its sections on *qiṣāṣ* and *diya* are identical to those of the Kelantan Bill.

As of this writing (November 2018), neither of these Enactments are being enforced and both remain as proposed bills due mainly to their conflict with the federal constitution of Malaysia. A detailed discussion of this appears in part two of this volume.

What follows next is a juridical review of doubt (*shubha*) and its application to crimes and punishments in light particularly of a leading hadith on this subject.

XVII

*Doubt (*Shubha*) and Its Impact on Punishment*

THE DISCUSSION IN this volume has frequently referred to doubt (*shubha*) and its impact on the enforcement of punishments. This chapter presents a juristic analysis of *shubha* in relationship to *ḥudūd*. A question has arisen as to whether the prevailing conditions of modern society would amount to juridical doubt, which suspends *ḥudūd* according to the directive of the hadith that will be discussed here. The hadith in question is a general and unqualified address to all Muslims, but perhaps primarily to rulers and judges, with the statemet to "suspend the *ḥudūd* in all cases of doubt" [إدرؤ الحدود بالشبهات]. Since this is a general (*ʿām*) ruling, it can be applied not only to courtroom situations but also to matters outside the courtroom environment and in society at large. Although the hadith would appear to be primarily concerned with the evidential process and trial proceedings, its wording does not qualify it as such. It would seem a fair assumption that in issuing this directive, the Prophet addressed his people and society and not necessarily court proceedings in particular.

The basic message of this hadith has also been conveyed in a legal maxim of fiqh (*qāʿidah kulliyyah fiqhiyyah*), which is a rehash of the hadith itself, simply providing that "*ḥudūd* are suspended/omitted in doubtful situations" [الحدود تسقط بالشبهات]. In a commentary on this maxim, the Mālikī jurist al-Jarḥazī (d. 1201/1787) discussed the authenticity of its underlying hadith and explained that it was reported by al-Tirmidhī, al-Ḥākim, al-Bayhaqī, al-Ṭabarānī, and Ibn Mājah, among others, and that "in view of the numerous chains of its transmission, many scholars, including Ibn Ḥajar al-ʿAsqalanī [the commentator of al-Bukhārī], have concluded that it is sound (*ṣaḥiḥ*)."[1] According to another report, three prominent

Companions, ʿAbd Allāh b. Masʿūd, Muʿādh b. Jabal, and ʿUqbah b. ʿAmīr, are quoted to have said: "When doubt befalls [you] concerning a *ḥadd,* suspend it" إذا اشتبه الحد فادرأه. This tends to underline the subjective aspect of doubt assessment: when a learned person, judge, or ruler is personally convinced as to the existence of doubt, he should suspend the punishment. In the context of punishments, it is not necessarily an overwhelming doubt but even a small amount that is at issue.

The renowned scholar of hadith, Ibn Shihāb al-Zuhrī (d. 124/724), conducted an investigation that led him to state in principle that "*ḥudūd* should be dropped in all cases of doubt" [الحدود تسقط بالشبهات].[2]

'Shubhāt' (s., *shubha*) as the key element in both the hadith and its related legal maxims is synonymous with *iltibās, ikhtilāt,* and *shakk* (confusion, ambiguity, and doubt). The doubt here also comprises probability (*iḥtimāl*), all of which stand in contradistinction with certainty (*yaqīn*).[3] *Shubha* is defined as a mere resemblance to certainty of that which is not certain. The juristic interpretations of *shubha* in conjunction with *ḥudūd* relate this concept to situations where the perpetrator of a *ḥudūd* offence acts under a mistaken perception. Typical examples of *al-shubhāt* in fiqh manuals include, in relationship to drinking (*shurb*), for example, cases where liquor is taken mistakenly for vinegar or medicine or when adultery is committed between a finally divorced couple who might have thought they were still in a lawful marriage. Similarly, theft from the public treasury (*bayt al-māl*), according to fiqh scholars, does not invoke the prescribed punishment because the thief is deemed to have a share, however slight, in its assets, which would introduce an element of doubt. By the same token when a poor person steals from assets earmarked for charity, there will be no prescribed punishment.[4] These are some of the obvious applications of doubts (*shubhāt*) in the enforcement of *ḥudūd*. The proof of the offence must also be clear of doubt, which refers to any doubt, however slight, that compromises the reliability of a proof such that it fails to establish certainty in ascertaining the relevant facts. Another instance of doubt that suspends the *ḥudūd* punishments is when the accused person retracts his confession. For when this happens, it casts doubt on the veracity of that confession, and the prescribed punishment is consequently suspended.

The majority of jurists (*jumhūr*) have adopted the substance of the hadith under review and ruled that doubt suspends the implementation of *ḥudūd*. Only the Ẓāhirīs have held otherwise on the analysis that this

would interfere with the implementation of clear shariah injunctions; they have also questioned the authenticity of this hadith. The majority have, on the other hand, differed among themselves as to what exactly amounts to doubt (*shubha*) and what does not. Whereas the Mālikīs, Ḥanbalīs, and the Shia do not classify *shubha* in any manner of classification and tend to look at each *shubha* individually, the Ḥanafīs, Shāfiʿīs, and Mālikīs have divided *shubha* into the following three types. The first is doubt pertaining to acts (*shubha al-fiʿl*) whereby a person is in doubt over the permissibility or prohibition of an act owing to ignorance, such as sexual intercourse with one's estranged wife during her waiting period *(ʿiddah)* following a final divorce, on the wrong assumption that it is lawful. It is also a requirement that the perpetrator of a *ḥudūd* crime knows that his act was unlawful. If the person convicted of adultery, for instance, says at the time of enforcement of punishment that he did not know that adultery was unlawful and takes an oath to that effect, what he says would create a *shubha* and suspend the prescribed punishment.[5] (2) The second is doubt pertaining to ownership or existence of a right (*shubha al-milk*), such as stealing from one's debtor or one's son, in which case the prescribed punishment is not enforced. This is based on the hadith that states, "you and your property belongs to your father." Yet it is also doubtful whether the father's ownership of his son's belongings also extends to illegal acts, such as theft and *zinā*! The third variety of doubt is known as contractual doubt (*shubha al-ʿaqd*), which Imam Abū Ḥanīfah himself, along with his disciple, Zufar, and Sufyān al-Thawrī (d. 161/778), have added to the foregoing two types. It means that the existence of an agreement or contract, even an unlawful one—such as marriage with a close relative that was only discovered at a later date—would introduce an element of doubt in the enforcement of the prescribed punishment of adultery. There will be no prescribed punishment due to a contractual doubt. If he knew of the prohibited degree of relationship in advance, he would be liable to the prescribed punishment. The majority of jurists, including the Shia, however, do not agree with this variety of *shubha*. They say that the person should investigate first and establish the legality of the marriage before he or she actually proceeds with it.[6] The Ḥanbalī school does not divide *shubha* into the said three varieties but gives relevant examples that tend to cover most of its manifestations, based on the analysis that doubt cannot be encapsulated into typologies and that this was how the Companions of the Prophet have also dealt with the subject.[7]

The Ḥanafīs also maintain, as already mentioned, that delay in confession and testimony without a valid excuse amounts to doubt that suspends the *ḥudūd* punishments in the Right of God type of crimes, such as theft, adultery, and consumption of intoxicants, but not in slander (*qadhf*). The other three schools do not agree and maintain that a mere delay does not invalidate a confession or testimony that is sound in all other respects. According to the renowned jurist Ibn Abī Layla (d. 83/702), delay (*taʾkhīr*) invalidates all types of proofs and causes suspension of *ḥudūd* penalties. This is because delay has an adverse effect on deterrence, just as it also raises the possibility that the offender might have regretted his conduct and repented or that the witnesses might have had certain reservations.[8] The Ḥanafīs and Shia Zaydiyyah maintain that the inability of the defendant to reveal a doubt (*shubha*) is also a *shubha* that invalidates *ḥudūd*, such as in the case of a dumb person who might have spoken about a possible doubt if he or she had the ability to speak. The majority have disagreed and maintain that a dumb person may express him- or herself by writing or even gestures.[9]

The consequences of applying the principle that doubt suspends *ḥudūd* tend to vary in that it may either completely absolve the accused of all charges or it may exempt him from the prescribed punishment and leave open the possibility of a lesser punishment under *taʿzīr*. The accused is thus cleared of all charges in the following three situations. The first is when doubt affects the essence of the accusation in question, such as when a person steals his own property while believing that it belongs to someone else, he or she cannot be punished for theft by way either of *ḥadd* or *taʿzīr*. The act here does not qualify as theft in the first place, which by definition is stealing the property of another person. The second is if there is doubt in the legal text or rules and their relevance to the conduct in question. For example, sexual relations in a marriage that is concluded without witnesses, or without the consent of the guardian (*walī*), cannot be punished by way either of *ḥadd* or *taʿzīr* since jurists have disagreed on the validity of such a marriage (some saying it is basically valid but voidable), and their disagreement introduces doubt. And the third situation is when doubt pertains to proof of a crime, where, for instance, witnesses retract their testimony or when it is not certain whether the offender suffered from insanity at the material time of committing the offence. In this case the accused will also be cleared of all charges.

In certain other situations, doubt (*shubha*) may suspend the principal punishment of *ḥudūd*, but a lesser punishment may still be imposed. Thus when a person steals from the public treasury, or when a father steals from his son, the prescribed punishment of theft is suspended but the judge may consider imposing a lesser punishment of *taʿzīr*. Similarly a person who retracts his or her confession is acquitted of the prescribed punishment but may still be punished under *taʿzīr*.[10]

It is further suggested that doubts also extend to the personality and character of the perpetrator of *ḥudūd*. The conventional position is thus disputed that the judge enforces *ḥudūd* crimes as soon as they are duly proven regardless of the personal conditions of the perpetrator. How can the judge ignore the personal factors and circumstances of perpetrators if they introduce elements of doubt? They must surely be considered in the adjudication of *ḥudūd*. It is further suggested that the hadith under review is not confined to *ḥudūd* but includes all punishments: *ḥudūd, qiṣāṣ,* and *taʿzīr*.[11]

The basic position in Islamic law that doubt overrules the enforcement of *ḥudūd* is also upheld in contemporary legal systems, especially with reference to its two well-known positions—one on the presumption of innocence and the other on giving the benefit of doubt to the accused. The main difference between the Islamic and contemporary penal systems, however, lies in the scope of the application of the principle. The predominant view among Muslim jurists seems to be that the principle of suspending *ḥudūd* because of doubt applies only to prescribed *ḥudūd* and *qiṣāṣ* crimes but not to *taʿzīr*. But the discussion here proposes that the word *ḥudūd* in the hadith under review includes all punishments, whether they fall under categories of *ḥudūd, qiṣāṣ,* or *taʿzīr*. They should all be suspendable when there is doubt. This is, in fact, the position in many other legal systems that embrace and apply the presumption of innocence and the principle of favouring the accused in the case of doubt in all classes of crimes.[12]

It thus appears that the fiqh interpretations of doubt in the hadith under review has included a wide range of circumstances that were perceived as doubt in light of the prevailing conditions of earlier times. It is a mere extension of the same logic to extend the application of the hadith/legal maxim to contemporary conditions. Bearing in mind the general language of the hadith, it is arguably not confined to the evidential process but encapsulates all doubt, within or outside the judicial process, all of which would fall within the range of cautionary advice of the hadith.

Modern society, with its temptations to sin, rampant secularity, and absence in most present-day Muslim countries of an appropriate context and environment for the enforcement of *ḥudūd*, do, we believe, present us with doubtful situations that can be subsumed under the purview of the hadith under review. This may still leave open, however, the prospects of some disciplinary or deterrent action. The doubt we propose is not a total eliminator of a charge but one that would most likely reduce the *ḥudūd* and *qiṣāṣ* to *taʿzīr*, which may in turn warrant some disciplinary or punitive sanctions the court may consider appropriate.

XVIII

Islam as a Total System

THE IMPLEMENTATION OF Islamic criminal law is generally seen as a component of Islamic revivalism. As such, it is not confined to any particular Muslim country but represents a wider development. A number of prominent Muslim scholars have spoken on the subject, and this chapter reviews the salient points of what they have said. There are those, of course, who maintain that the implementation of Islamic criminal law offers a good answer to the problem of rising criminality and that, in any case, Muslims have little choice in the matter of implementing God's law. There has also been a general expression of concern that implementing shariah penalties under contemporary conditions, where the individual is surrounded by modern society's temptations and the disabilities they entail, could amount, in some cases at least, to a miscarriage of justice. It is widely accepted that Islam is a way of life and that if implemented in its entirety in itself can operate as a major deterrent against crime. But there are challenges in achieving the objectives of Islamic criminal justice in an environment strongly influenced by the currents of secularist modernity, liberalism, and globalisation, which have impacted culture and religion in many different ways. These challenges frustrate, rather than satisfy, the Islamic vision of justice and fair play.

"A remarkable fact about the Shariah," according to Abūl Āʿla Maududi of Pakistan (d. 1399/1979), is that it is "an organic whole" and any arbitrary and selective division of the general scheme of shariah is therefore "bound to harm the spirit as well as the structure of the Shariah." There were people, Maududi added, who selected a few provisions of the Islamic penal code for implementation without realising that those provisions need to be viewed against the background of the whole Islamic system of life. "To

enforce those provisions in isolation would in fact be against the intention of the Lawgiver," he said.[1]

With reference to the amputation of the hand for theft, Maududi added that this was meant to be promulgated in an Islamic society wherein the wealthy paid zakah to the state and the state provided for the basic necessities of the needy—a society wherein all citizens enjoyed equal opportunities to seek an economic livelihood, monopolistic tendencies were discouraged, and people were God-fearing and helped each other for the sake of gaining God's pleasure. The prescribed punishment of theft is "not meant for the present-day society where you cannot get a single penny without having to pay interest; where in place of Baitul Māl [the public treasury], there are implacable money-lenders and banks," which treat the poor with brutal contempt. In a world where everyone is out for himself, where the economic system leads to the enrichment of the few at the cost of crushing poverty of the many, then "enforcing the *ḥadd* of theft would amount to protecting the ill-gotten wealth of the exploiters."[2]

As for the prescribed punishment of adultery, it is meant for a society where marriage is made easy; where traces of suggestiveness are minimised; and where virtue, piety, and remembrance of God are kept ever-fresh in the minds and hearts of people. It is not meant for a society where "sexual excitement is rampant, wherein nude pictures, obscene books and vulgar songs have become common recreation" and economic conditions and social customs have made marriage difficult generally and extremely difficult for the very poor.[3]

In his book *Punishment in Islamic Law,* the prominent Egyptian scholar and jurist, Salīm al-ʿAwā, has quoted Maududi and confirmed his analysis to the effect that Islam envisages a comprehensive scheme of values for society. What has happened is that many Muslim countries have borrowed the penal philosophy of an alien system. Under such circumstances, it is totally wrong, al-ʿAwā adds, to attempt to enforce *ḥudūd* as an isolated case. The contemporary Muslim society could hardly be said to have adopted, or even to have understood thoroughly, the Islamic way of life, and there is "no exception to this statement even in the widely-cited examples of some Muslim societies" (presumably Saudi Arabia). It does not make sense under the present circumstances to amputate a thief's hand when he might have no means of livelihood or to "punish in any way *zinā* (let alone by stoning to death) in a community where everything invites and encourages unlawful sexual relations."[4] Al-ʿAwā then concludes: "One can say that the application of the Islamic penal system under the present

circumstances would not lead to the achievement of the ends recommended by this system."[5]

It is further added on a historical note that the change of circumstances is not a peculiarity of twentieth-century Muslim societies but that significant changes had begun to occur from as early as the late second century Hijrah. Al-ʿAwā thus wrote that, from a perusal of Abū Yūsuf's (d. 182/798) *Kitāb al-Kharāj*, one obtains a "clear understanding that by his time the Islamic penal system was far from being enforced."[6] In his discussion of punishments, Abū Yūsuf, who later became chief justice of the ʿAbbāsid empire under Hārūn al-Rashīd, wrote, for example, an address to the caliph, stating that "if you would order that the *ḥudūd* should be implemented, it would help reducing the prison population, frighten the transgressors and prevent crime."[7]

لو أمرت بإقامة الحدود لقل أهل الحبس واخاف الفساق وأهل الدعارة.

Abū Yūsuf obviously made a point suggesting that *ḥudūd* were being neglected, and he said so to the head of state himself.

Cheriff Bassiouni has observed that Islamic criminal justice is essentially what in contemporary terms would be called a "policy," or *siyāsah*-oriented system, in that a great deal of it is open to the input and influence of judicious policy (*siyāsah sharʿiyyah*). Bassiouni adds that Islamic law is not a rigid and repressive system as has sometimes been represented or, for that matter, even practised by some states. It is rather the opposite of that, he says. A good example, in the area of penalties, a subject that is often "misunderstood and misapplied," is the penalty of theft, for which the punishment is the cutting of the hand. But the Islamic *ḥudūd* penalties contemplate a thief who steals in a "just society, which eliminates needs," where the punishment may be appropriately deterring. The punishment is "not necessarily applied in a society which does not have the characteristics of being just."[8] In support of this view, Bassiouni refers to the following evidence in the precedent of the caliph ʿUmar b. al-Khaṭṭāb:

> It was reported to ʿUmar b. al-Khaṭṭāb that some boys in the service of Ḥāṭib Ibn Abī Baltaʿah had stolen the she-camel of a man from the tribe of Muznah. When the caliph ʿʿUmar questioned the boys, they admitted the theft, so he ordered their hands to be cut. But on second thoughts he said addressing Abī Baltaʿah: "By God I would cut their hands if I did not know that you employ these boys and

> starve them so that they would be permitted to eat that which is prohibited unto them." Then he addressed their employer saying "Since I decided not to cut their hands, I am going to penalise you with a fine that shall pain you," and he ordered him to pay double the price of the she camel.[9]

The social policy orientation of Islamic criminal law can clearly be seen in the precedent and Sunnah of the Prophet himself and that of the Pious Caliphs that came after him in that they took into account the prevailing economic and political conditions of the community in the enforcement of *ḥudūd*. These were not to be enforced, the Prophet had so instructed, in times of military engagement with the enemy forces, as there would otherwise be the danger of defection, disunity, and military weakness. Concern for preventing these dangers from occurring commanded a higher priority than enforcing *ḥudūd*. We also note that the caliph ʿUmar b. al-Khaṭṭāb suspended, once again on grounds of judicious policy, the prescribed penalty of theft during the year of the famine (*ʿām al-majāʿah*) for the obvious reason that enforcing the punishment under such circumstances would be unjust and would violate the basic objective and philosophy for which the punishment of theft was validated in the first place.[10]

Fazlur Rahman was critical of the rigidity that Islamic juristic thought had webbed into *ḥudūd*. The juristic concept of *ḥudūd* deems these punishments as mandatory, a demand from God Most High that required fulfillment in an absolute manner. It is a matter of attention, Fazlur Rahman observed, and a potent issue of deep authentic research that the Qur'anic concept of *ḥudūd*, which stands for "separating or preventing," by virtue of later developments, "has been reserved to signify fixed and unchangeable punishment that is laid down in the Qur'an and Sunnah. The concept of separating or preventing limit of the Qur'an is thereby replaced by the idea of fixed punishment."[11]

The all-embracing character of Islam and its shariah were also underlined in an article by Abdullah al-Khalifah, who stated that Islam provided comprehensive instructions not only on devotional matters but also on social relations within and outside the family. It laid emphasis on enjoining good and preventing evil; kindness to parents and relatives; treating neighbours, orphans, the poor, and wayfarers properly; and taking care of one's possessions.[12] Most forms of worship in Islam are performed in public, which tends to encourage social awareness and discipline. Al-Khalifah adds that religious observances help to act as disincentives to crime, so

much so that a pious Muslim person would consider criminality a violation of God's law and contrary to his/her religious beliefs. This was the case in earlier times, but it is uncertain whether a social environment of that kind still obtains in contemporary Muslim societies in the borderless age of secularity and globalisation.[13]

With reference particularly to Malaysia and whether its people were ready to implement *ḥudūd,* Mahmud Zuhdi Abdul Majid, a university professor and scholar of shariah, spoke at an international conference in Kuala Lumpur and made the observation that "Malaysia in the 20th century is not the same as the Arab lands were in the 12th century." He stressed the need for "ijtihad or innovative thinking based on the philosophy of Islam," adding that it was simplistic to think that one can implement the same Islamic laws here and now. For this will "invite failure as we will be doing something that precedes something that should have been done first."[14]

Commenting on the prescribed punishment of adultery, the learned Shaykh Yūsuf al-Qaraḍāwī has also underscored the change of environment and the temptations that modern society has created. This discussion has, on one hand, examined the high and, in some places, exorbitant costs that are incurred in marriage, dower, and wedding ceremonies and what follows these events (i.e., providing a house, furniture etc.); on the other hand, there are 101 temptations that do not fail to tax the limits of individual self-restraint. In al-Qaraḍāwī's phrase, "When there is a dramatic change of circumstances, when the door to halal (lawful) is closed and one thousand doors to *ḥarām* (unlawful) are opened...the individual is surrounded by temptations to sin. Is it then certain that justice will be served by insisting on the *ḥadd* of adultery?" Al-Qaraḍāwī made a similar comment on the prescribed punishment of theft in discussing the prevailing conditions of modern society when he wrote:

> The justice of Islam does not admit the logic that the command of God is executed on the thief as punishment for what he or she might have stolen and yet we neglect the command of God on the payment of zakah (legal alms) and the social support system (*al-takāful al-ijtimāʿī*) of Islam. There is only one verse in the Qur'an on the *ḥadd* of theft but literally dozens of verses on zakah and helping the poor.[15]

Shaykh Muḥammad al-Ghazālī has advanced a similar argument and finds certain aspects of the debate insisting on the enforcement of *ḥudūd* to be

less than acceptable and convincing. "We do not dispute" wrote al-Ghazālī, "that *ḥudūd* are a part of Islam, but we find it strange that they are considered to be the whole of it."[16] To enforce *ḥudūd*, one needs to establish an Islamic political order first. Al-Ghazālī went on to write, "We wish to see these punishments enforced...but not so that the hand of a petty thief be cut while those punishments are waived in cases of embezzlement of stupendous funds from the public treasury."[17]

These and similar other considerations have led the prominent Syrian scholar, Muṣṭafā Aḥmad al-Zarqā (d. 1999), to the conclusion that the prevailing environment is unsuitable for the enforcement of *ḥudūd*. He then invokes the legal maxim of shariah that "necessity makes the unlawful permissible—*al-ḍarūrāt tubīḥ al-maḥzurāt*" (the origin of this legal maxim is Qur'anic; al-Baqarah, 2:173). Al-Zarqā further wrote: "When emergency or unavoidable situations hinder the enforcement of an obligatory command [i.e., *wājib*] then the latter may be temporarily postponed." Based on this argument, al-Zarqā concluded that *ḥudūd* may be substituted with alternative punishments until such a time when conditions are right for their proper enforcement. To quote al-Zarqā:

> When it is observed that enforcing the four *ḥudūd* offences has become unfeasible at a certain time or place, until then, it should be possible to apply an alternative punishment, and doing so does not necessarily mean abandonment of the shariah.[18]

Al-Zarqā wrote this in the 1960s, but he revisited the issue again in the revised edition of his highly acclaimed book in the 1990s. It is instructive to note that he maintained his earlier views and has even further elaborated on some of them. His views appear under the heading, "The Difficulty over the Implementation of Hudud," where he discusses the various *ḥudūd* punishments and explores their implementation prospects.[19] Al-Zarqā refers to contemporary conditions and contextualises at least three of the five *ḥudūd* punishments therein as follows:

(1) Implementation of the prescribed punishment for theft, for instance, is connected to the amount of effort the society is making to take care of the poor and the deprived in their midst and see to their needs through fair redistribution of wealth and realisation of the social support system of Islam.[20]

(2) Implementation of the prescribed punishment for adultery is also related to the care and attention given to the cleansing of society from the temptations of enticement (*fitnah*) and promiscuity. It also relates to awareness-raising among people of their religious obligations that would inculcate piety and facilitate easy access to marriage.
(3) The prescribed punishment for wine drinking similarly relates to the question of access and the restrictions imposed on its manufacture, advertisement, and trading as well as awareness-raising among people that would discourage its use.[21]

These interconnections between the vices at issue and their related punishments should be seen as prerequisites for effective implementation of *ḥudūd* under shariah.

Al-Zarqā added: "When the mass media is preoccupied by publicity and advertisements on consumption of liquor, actually informing the public on how to compare and choose the best in the available range of liquor varieties, then implementation of the proposed punishment becomes a far cry from actual reality. Similarly, when women expose their bodily beauty in the name of progress and civilisation, and when the prevailing economic system is protective of exorbitant differentials in income levels and wealth—such that the vast majority is deprived and the minute minority is privileged beyond measure, then "how can one consider implementation of *ḥudūd* under such conditions to be tantamount to correct application of the shariah? Or is this application only in name, but in reality nothing more than indulgence in doubtful exercises, even contradictions?"[22]

In a section of his 2014 book, Shaykh Bin Bayyah advances a more detailed argument for postponing the implementation of *ḥudūd*—basically under three points as follow:

(1) Shariah and religion are two distinct but separate aspects of Islam. Whereas religion is primarily dogma and faith, shariah consists of practical rules. The former is founded on decisive proof (*thubūt qaṭʿī*) of the Qur'an and *mutawātir* hadith independently of interpretation, and the practical rules stand on effective causes and conditions. Neglect of practical rules does not amount to renunciation of Islam provided it is not espoused with rejection or denial in principle. *Ḥudūd* punishments fall under practical rules, and they depend on effective causes (*asbāb*) and are enforced when causes and conditions are present and no juridical hindrance (*māniʿ*) gets in the way of their enforcement.[23]

(2) *Ḥudūd* are enforced by command of the leader, which means the head of state and Parliament. For they take responsibility based on their election and pledge of allegiance. Past leaders, including the Prophet himself and his Companions, have taken charge of the enforcement of *ḥudūd* punishments and suspended them when public interest or *maṣlaḥah* so dictated. The Prophet suspended *ḥudūd* during military engagements for fear of the soldiers defecting and joining the enemy forces. The caliph ʿUmar b. al-Khaṭṭāb suspended *ḥudūd* in the year of the famine to avoid oppression and manifest injustice. ʿUmar also did the same in the case of theft of the slaves of Hatib b. Abi Balta'ah. Saʿd b. Abī Waqqāṣ did not enforce the *ḥadd* of drinking on Abī Mahjan al-Thaqafī as he was such a fine general and successful warrior. The Caliph ʿUmar b. ʿAbd al-ʿAzīz ordered his governors to refer to him all cases of death and mutilation sentences and obtain his approval—quoting the hadith that *ḥudūd* should be suspended as far as possible in all cases of doubt (*adraʾū al-ḥudūd ʿan mā istataʿtum bi'l-shubhat*). Thus we find that in each case leaders have suspended *ḥudūd* for a specific reason or cause. When a leader is convinced that enforcing *ḥudūd* or *qiṣāṣ* would bring about greater harm than the benefit that accrues with their enforcement, then he suspends enforcement. Here Bin Bayyah mentions both Imam Abū Ḥanīfah, who spoke of *taʿṭīl*, and Imam Aḥmad Ibn Ḥanbal, who used *taʾkhīr* (postponement, suspension).[24]

(3) *Ḥudūd* punishments are suspended in the face of doubt, as per the ruling of hadith. The question Bin Bayyah raises is on what grounds/causes. Should the doubts (*al-shabbāt*), which are the effective causes of suspension, be specific? Or can the effective cause be something general? In response, Bin Bayyah mentions that some of the instances of postponement in the past were based on "Islam's interests" (*maṣlaḥat al-Islām*), which Ibn Qayyim al-Jawziyyah has also spoken about, and it is not a specific cause but a general one (resembling *ḥikmah* as opposed to *ʿillah*). We do not really have a good reason to think that our soldiers will join the enemy forces as not all Muslims are now engaged in warfare with enemies. *Ḥudūd* punishments are in principle suspended in "enemy territory" (*fī arḍ al-ʿaduww*), but then who are the enemies? And if there are enemies, how are they affecting the Muslim homeland and in what way? Here Bin Bayyah says that the Muslim world is not a monolithic entity. Some countries may be engaged in war, others may be suffering from hunger, and still others are faced with different

> levels of doubt. If a Muslim country can enforce *ḥudūd* and there is no impediment or fear of greater harm or of foreign aggression, it should enforce *ḥudūd*. If all the *ḥudūd* punishments cannot be enforced but some can be, the latter should be enforced based on the fiqh legal maxim: "What is feasible is not omitted by the omission of that which is unfeasible' (*lā yusqat al-maysūr bi-suqūt al-maʿsūr*). That said, Bin Bayyah regards the overall situation prevailing in the Muslim world as imbued with doubts of different kinds. If a country does enforce the *ḥudūd* punishments, it should make sure: (a) to assign teachers and propagators of Islam constantly to instill moral values and purity of character among people; (b) to strengthen the foundations of shariah and its comprehensive enforcement away from negative influences of secular modernity; and (c) to conduct sustained dialogue and communication with groups and parties that poison the minds of the general populace.[25]

Bin Bayyah has thus held that the enforcement of *ḥudūd* should be approved by the head of state and Parliament; that *ḥudūd* may be suspended if enforcement means that greater harm will definitely materialise; and that one size does not fit all (i.e., some countries may be able to enforce the *ḥudūd* punishments either wholly or partly, and their judgments should be based on prevailing realities).

PART TWO

Islamic Criminal Law in Malaysia

Introductory Remarks

Islamic criminal law in Malaysia that is expounded in the following pages is based mainly on developments in its two northern states of Kelantan and Terengganu and, in particular, on the State Enactments they have introduced for the purpose of introducing Islamic criminal law, including *ḥudūd* punishments, in their respective states. (For purposes of this discussion, other states of Malaysia and the federal government are referred to for context.) As of this writing, no other state of Malaysia has introduced Islamic criminal law, an Islamic state, or *ḥudūd*. Even in the two states mentioned, *ḥudūd* punishments still remain at the level of discussion and debate as relevant Enactments; though both have been duly passed by their respective state authorities, they are yet to be implemented. What follows is a review of the two Enactments and the public debate and media coverage of events concerning them.

XIX

Hudud Bill of Kelantan 1993

ISSUES IN RAPE AND *Zinā*, WITNESSES, AND CONFESSION

THE SHARIAH CRIMINAL Code (II) Bill 1993 of Kelantan (henceforth referred to as HBK) consists of seventy-two clauses and five supplementary schedules, divided into six parts—namely *ḥudūd* offences, *qiṣāṣ* (just retaliation), evidence, implementation of punishments, general provisions, and shariah court proceedings. The *ḥudūd* offences in part one appear, in turn, under the six headings of theft, highway robbery (*ḥirābah*), unlawful carnal intercourse (*zinā*), slanderous accusation (*qadhf*) of adultery (which is not proved by four reliable witnesses), wine drinking (*shurb*), and apostasy (*irtidād*).[1] This chapter reviews the provisions of HBK pertaining to *ḥudūd,* which have become the focus of public attention and debate ever since 1991, when the State Government of Kelantan announced its plans for the implementation of Islamic criminal law in that state. In November 1993 the state legislature unanimously passed HBK and the then chief minister, Nik Aziz Mat, announced that HBK "could not be implemented until the Federal Government of Malaysia made changes to the Federal Constitution."[2] This was evidently an acknowledgement that, in passing HBK, the state legislature had exceeded its jurisdiction under the federal constitution and had, as such, set the scene for a possible confrontation with the federal government, which is what actually happened.

The state government also announced that HBK "was prepared by a committee and reviewed and approved by the Jumaah Ulama [group of ulama] of the State Islamic Religion and Malay Council [MAIK] and the state Mufti after considering it from all aspects of the Islamic Shariah."[3]

The chief minister added that, by enacting HBK, the state government was "performing a duty required by Islam" and that failure to act in this regard "would be a great sin."[4] As for the question as to whether the people had accepted the state government's plan to implement *ḥudūd* laws, the then deputy chief minister, Abdul Halim, made the remarkable announcement that "the question did not arise as Muslims in the State who rejected the laws would be considered *murtad* (apostate)."[5]

The punishments that the bill has introduced read like a reproduction of the all too familiar fiqh manuals on the subject. It was even said that HBK had adopted the renowned Shāfiʿī jurist Abū l-Ḥasan al-Māwardī's (d. 450/1058) *Kitāb al-Aḥkām al-Sulṭāniyah* and merely changed it into a statute book format. The punishments so adopted range from mutilation of the hand for theft, flogging and stoning for a proven offence of adultery (*zinā*), the death punishment for terrorism (*ḥirābah*), and flogging for both wine drinking and slander (*qadhf*).

In its section on theft, HBK penalises the first offence when it fulfills all the prescribed conditions (fifteen such conditions provided under clause 7)—with amputation of the right hand from the wrist—and the second offence with amputation of the left foot (in the middle in such a way that the heel may still be usable for walking and standing). The third and subsequent offences of theft are punishable with imprisonment for such terms as in the opinion of the court are "likely to lead to repentance" (clauses 6 and 52). The punishment for banditry (*ḥirābah*) is death and crucifixion if robbery is accompanied by killing; and it is death only if the victim is killed but no property is taken away. But if the robber only takes the property without killing or injuring his victim, the punishment is amputation of the right hand and the left foot (clause 9).

Adultery is punishable by stoning to death (with stones of medium size) for a married person (*muḥṣan*) and flogging of 100 lashes, plus one-year imprisonment for the unmarried offender. Four eyewitnesses are required to prove the act. Each witness must be an adult male Muslim of just character, and witnesses are presumed to be just until the contrary is proven. The HBK also states that pregnancy on the part of an unmarried woman, or when she delivers a child, shall be evidence of adultery, which would make her liable to the prescribed punishment (clauses 1, 41, and 46). There is no further elaboration on the predicament of the male partner in adultery, especially in situations where he might have escaped arrest and cannot be interrogated or the accuracy of information about him cannot be verified.

Slanderous accusation of adultery (*qadhf*), which the accuser is unable to prove by four witnesses, carries eighty lashes of the whip, and punishment for drinking liquor based on oral testimony of two persons is whipping of not more than eighty lashes but not less than forty (clauses 13 and 22).

A Muslim (adult and sane) who is accused of apostasy is required to repent within three days, and failure to do so makes him or her liable to the punishment of death as well as forfeiture of his or her property. The offender will be free of the death sentence, even if it has been passed, if he or she duly repents, in which case his or her property will be returned but the defendant would still be liable to imprisonment "not exceeding five years" (clause 23).

The HBK provides for the establishment of a Special Shariah Trial Court consisting of three judges, two of whom shall be ulama, and a Special Shariah Court of Appeal, consisting of five judges, including three ulama. These courts are to be in addition to the shariah courts that normally operate in Kelantan. Any person who held the office of judge at the High Court or the Supreme Court may be appointed as judge of the Special Shariah Court. Similarly, ulama who hold or have held office as a chief judge (*qāḍī besar*) or mufti, or who possess equivalent qualifications, may be appointed as judges (clauses 63–68). All sentences can be appealed. And sentences are enforceable, in the case of prescribed *ḥudūd* offences, only when confirmed by the Special Appeal Court (clause 49). Finally, the *ḥudūd* punishments are all mandatory and inflexible as HBK provides that "the *ḥudūd* punishments imposed under this Enactment shall not be suspended, substituted for any other punishment, reduced or pardoned or otherwise varied or altered" (clause 48).

In March 2015 the State Legislature of Kelantan passed amendments to some of the sections of HBK 1993 that excluded non-Muslims from the purview of its implementation. These amendments have been reviewed in a separate section below. The substance of these amendments also applies to the Hudud Bill of Terengganu 2002 (HBT) as also discussed in the following section.

Differentiating rape from *zinā,* and their proofs—whether by witnesses, pregnancy, or confession—are the most widely debated issues concerning HBK and HBT and similar prevailing practices in other Muslim countries.

Ḥudūd legislation in Malaysia and elsewhere, such as in Pakistan, Nigeria, and Iran, came under criticism for their total silence over the

problem of rape, the preclusion of women from being witnesses in *ḥudūd*, and the preclusion also of circumstantial evidence in the proof of *ḥudūd* crimes. While HBK has a section on adultery (*zinā*), it makes no mention of rape, presumably because rape is covered in the national Penal Code. However, HBK has not stated this explicitly and has left the subject vague. Adultery has been broadly defined as "sexual intercourse between a man and a woman who are not married to each other and such intercourse did not come within the meaning of intercourse by mistake (*waṭi shubhah*)" (clause 10, HBK). Intercourse in doubtful circumstances is when the man mistook the woman for his wife or acted in the belief that there was a valid marriage (clause 10, HBK). In the absence of a provision to separate rape from *zinā,* rape is likely to be subsumed by *zinā* and the same rules will apply to both. Thus reads clause 46(2) of HBK: "In the case of *zinā*, pregnancy or delivery of a baby by an unmarried woman shall constitute evidence on which to find her guilty of *zinā* and therefore the *ḥudūd* punishment shall be passed on her unless she can prove to the contrary." This potentially equates rape with *zinā*. While *zinā* is consensual, rape is intercourse under duress. To apply the rules of *zinā* to rape would mean that the rape victim must bring four male witnesses of just character to prove the charge against her attacker, and if she fails to produce these witnesses or proof by other means, she would herself be liable to the punishment of slander (*qadhf*). The burden of proof is thus placed on the defendant to prove that she was the victim of coercive force. "To shift the burden of proof to the woman in the case of pregnancy or delivery of a child," as one commentator noted, "is ludicrous" as she will not find the required proof. Notwithstanding the fact that this clause has been the focus of public criticism "There appears to be a doggedness on the part of the State Government to retain the Clause as it has been drafted."[6]

Another problematic aspect of the *ḥudūd* proceedings in Malaysia and many other Muslim jurisdictions is the exclusion of female witnesses in the proof of these crimes. This is an aspect of the fiqh provisions that has proven difficult to change. Yet a third issue to consider is the acceptance of pregnancy as proof of *zinā*, despite the fact that pregnancy is circumstantial evidence, which is, in principle, not admissible in *ḥudūd*. With regard to the witnesses of *zinā,* HBK provides that "each witness shall be an adult male Muslim who is *akil baligh* (adult and competent) and shall be a person who is just" (clause 41). Women have thus been disqualified to be witnesses not only in *zinā* but in all the *ḥudūd* offences. Confession, which is the only other means of proof in *ḥudūd* crimes, binds only the confessor

and not any other party charged with the same offence—and it can, in any case, be retracted by the accused any time "even while he is undergoing the punishment" (clause 44). The textually prescribed proof of *zinā* by four eyewitnesses is next to impossible to produce. Then confession by the accused, whether in adultery or rape, is also retractable. Thus it becomes obvious that a woman who has either been lured into sin or raped, and who may only be able to present female witnesses, or a combination of males and females, has no prospects of proving her case.

A pregnant woman is put in a position, in the cases both of *zinā* and rape, to prove the crime against her or face prosecution for slander. Unless the man makes a confession that he can in any case retract later, the woman is doomed to be punished either for *zinā* or for *qadhf*.[7] The dilemma of the rape victim is made worse due to the fact that it is common among rape survivors not to seek medical aid immediately out of fear and shame. And it is not uncommon that the rape survivor did not struggle for fear of her own safety or the safety of others who might have been threatened along with her.[8]

Women activists and critics of HBK drew attention to the plight of rape victims in Pakistan and stated that the Pakistani experience since the passing of the Shariah Ordinance in May 1991 has shown that *ḥudūd* offences account for 60 to 70 percent of women in detention. According to 1991 figures compiled by the Karachi-based committee for the repeal of the Hudud Ordinance, more than 2,000 women were at that time in jail awaiting trial under this law. Most of them were accused of *zinā* by their relatives who were intent on keeping them in forced marriages or simply because they left home with a man of their choice. Rich landlords abused peasant women and servants, and when the latter complained of rape to the authorities, they were themselves punished because they could not find four male eyewitnesses of good character to testify for them.[9]

A charge of *zinā* against a man is provable by four male eyewitnesses or his own confession, there being no other way of proof other than these two. But the charge of *zinā* against a woman is provable by four male eyewitnesses, her confession, or (being unmarried) by pregnancy or delivery of a child. In the case of a married woman who is accused of *zinā* by her husband, HBK allows her husband, through the procedure of imprecation (*liʿān*), to disown the child, in which case the marriage will be dissolved even if the wife exercises a counteroath to rebut the accusation of *zinā* (clauses 14 and 15).[10] What follows next is an overview of the Hudud Bill of Terengganu.

XX

Hudud and Qisas Bill of Terengganu 2002

THE TERENGGANU SHARIAH Criminal Offences (Hudud and Qisas) Bill 2002 (henceforth HBT) was introduced after the 1999 general election in which the Islamic Party (PAS) won the state of Terengganu in addition to Kelantan. The HBT is a near-replica of its Kelantan antecedent. Hence this chapter's appraisal and comments on HBK 1993 also apply, mutatis mutandis, to HBT. One of the few differences of note between the two documents under review is that HBT omitted, though at a later stage, the offence of *bugha* (armed rebellion), which was included as a *ḥudūd* crime in section 4 of its original draft. This was deleted in mid-2002 at a time when Abdul Hadi Awang, then chief minister of Terengganu, tabled HBT before the Legislative Assembly of Terengganu.[1]

The state legislature passed HBT in July 2002, followed by Hadi Awang's announcement the same month that the sultan of Terengganu, Sultan Mizan Zainal Abidin, "gave his consent last week after a briefing by the state government." The chief minister said that the "enactment would be effective 30 days after it was passed even if it had not received the Sultan's consent."[2] The HBT could still not be enforced, however, due to conflicts of jurisdiction and constitutional issues.

The HBT consists of seventy-four sections and a similar chapter division and wording as that of HBK, presenting its readers with the same set of unresolved issues. The HBT goes a step further in fact to articulate some of the most controversial aspects of HBK. Sections 9(2) and 48(2) of HBT state, for instance, that a woman who reports she has been raped but does not provide clear or circumstantial evidence will be charged with *qazaf* (slanderous accusation) and liable to be flogged eighty lashes. As a

proof, the victim must provide four Muslim male witnesses to the crime or, alternatively, get the rapist to make a confession. Then it is further provided that women and non-Muslims, whether male or female, cannot act as witnesses. An unmarried woman who becomes pregnant is thus assumed to have committed *zinā* even if she has been raped! Some of these rulings are also found in HBK, albeit indirectly and by implication, but HBT boldly articulated them with the inevitable consequence that the burden of proving rape is placed squarely on the victim's shoulders instead of the prosecutor. Why should a crime victim need to prove her innocence?

The HBT provisions pertaining to rape became media topics even before the bill was passed by the state legislature. The then minister of women and family development, Shahrizat Abdul Jalil, commented with reference to rape that it placed a cruel and unfair burden on the victim to be raped and then forced to bear the responsibility of proving that she was raped. "The implications will be disastrous as rape victims will avoid making reports for fear of being punished," she said. Shahrizat also stated that under the Penal Code and the Criminal Procedure Code, the burden of proving a crime lay with the public prosecutor and not the victim, as stipulated in the proposed enactment.[3] She added, "It is impossible to provide witnesses because rape usually happens in quiet and secluded places." The Malaysian Muslim Youth Movement (ABIM) did not oppose HBT in principle but proposed that the government amend its discriminatory provisions.[4] In the event that a public prosecutor fails to prove the charge beyond a reasonable doubt, the court would free the accused, but that does not necessarily mean that the plaintiff was lying and should be punished instead. Minister Shahrizat then said that approving HBT would be equivalent to giving criminals the "license to rape without providing the victims a fair and adequate defence." Shahrizat appealed to "all Terengganu women, including members of PAS women's wings" to join her ministry in protesting against the enactment. She criticised PAS for "frequently using minority and negative interpretations in handling women's issues"; it should advocate instead for interpretations that do not discriminate against anyone.[5] Ali Rustam, the then chief minister of Melaka, commented that HBT was "definitely unfair to rape victims because it is impossible for a victim to identify four witnesses who can prove that she was violated....The rape victims have already been through a lot and the Terengganu state is trying to aggravate their situation."[6]

Women's Aid Organisation director Ivy Josiah, along with another women's advocacy organisation, Sisters in Islam, also spoke in support of

Minister Shahrizat's call. The Federal Territory Wanita Malaysian Chinese Association (MCA) representative, Tai Sim Yew, and the Democratic Action Party (DAP) representative, Ng Siew Lai, all registered their criticism of HBT as being "retrogressive and contradictory to the Evidence Act 1950," saying that the Terengganu government should call for a public hearing in addition to holding seminars and forums to better inform the public.[7] Whereas Minister Shahrizat, representing the government's view and presumably that of the United Malays National Organisation (UMNO, the ruling party), suggested that HBT should be withdrawn altogether, Fauziah Salleh, chief of the Wanita (Women's) Wing of Keadilan (the Justice Party), commented that "Parti Keadilan National does not oppose the implementation of the *ḥudūd* law ... but has reservations on certain sections of the law." She called for a review of sections 9(2) and 48(2) of HBT to ensure that rape victims are treated fairly and that the burden of proof should not be on the rape victim as the bill stipulates. Fauziah Salleh added that the section on the witnesses should include DNA sampling and blood or semen samples apart from the four witnesses. She also suggested that separate sections should be added to the existing draft to deal with rape and incest.[8] Other aspects of HBT that needed to be studied, Fauziah went on to add, were the addition of a subsection to define rape under the chapter on adultery and the creation of a special section to deal with incest and rape.[9]

Dr. Lo' Lo' Ghazali, PAS's only elected woman MP and head of the *muslimat* wing, responded that only certain clauses of HBT needed to be reviewed. The state government "should amend the draft to ensure that the Bill would not discriminate against women. The issue is not to oppose the *ḥudūd* laws but to modify the wordings and legal interpretations related to rape so as not to victimise women."[10]

The then chief minister of Terengganu and PAS deputy president, Hadi Awang, responded, oddly enough, that parties opposing the *ḥudūd* laws "have no strong ground" to criticise as "they have little understanding of them." He added, however, that if necessary the state government was willing to meet with critics to clear the air: "It seems like they need some guidance on this matter," he said. With reference to the specific aspects of the public criticism of HBT, Hadi Awang responded that "the state government was already rectifying flaws on rape cases by making amendments on the final draft" before it was tabled to the next state Legislative Assembly meeting in July 2002.[11] With reference to Minister Shahrizat's critique of HBT, Hadi Awang reiterated that the Qur'an assured that women will get

justice. "Under *qazaf*, the one who makes false accusations against women will be flogged 80 times. And this provision protects only women."[12]

Khalid Samad, a PAS member of Parliament, commented that "PAS cannot change at random or even at the will of members. It has a fixed basis and that's the ideology of the party, the role of the ulama, the central placing of the religion. That remains irrespective of who comes or goes."[13] The PAS's vice president, Mustafa Ali, elaborated that "the respect for *ulama* is genuine. We will continue to turn to them for guidance."[14]

Prime Minister Dr. Mahathir said that Terengganu should submit the draft to the attorney general's chamber before enforcing it: "the Attorney General would have to examine whether the proposed law is consistent with the federal laws and the concept of justice."[15] In response, Chief Minister Hadi Awang said that this was done when Kelantan wanted to implement shariah laws: "the only problem was that it never came back to the state for implementation."

On 17 June 2002, Chief Minister Hadi Awang held an open session in Kuala Lumpur to which he invited the nongovernmental organisations (NGOs), women's organisations' representatives, and others to address their queries so that he could explain HBT to them. Just before this meeting, Hadi Awang announced that the HBT provision concerning rape had been revised such that the proposed law would not be unfair to women. He also surprisingly announced that "the amendments were now classified under the Official Secrets Act and would not be made public until they are tabled."[16]

A Kuala Lumpur law firm had challenged the constitutionality of HBT before the federal court, and the chief minister's response to this was that they could take their case anywhere they want but that he was going to table HBT before the Legislative Assembly of Terengganu that was due to meet in July 2002. Then followed Dr. Mahathir's announcement that the federal government would block any attempt by the Terengganu government to implement "its so-called *ḥudūd* law."[17] Dr. Mahathir added that HBT was unjust and therefore not Islamic: "Islamic laws are fair and just," he said.

The then deputy prime minister Abdullah Badawi and the minister in the Prime Minister's Department Rais Yatim both separately commented that Terengganu also lacked the expertise to administer the proposed law. There were no competent shariah judges nor even a well-equipped police force to implement it.[18]

The then inspector general of police, Norian Mai, also followed to say that the police would not get involved with implementation of the *ḥudūd* and *qiṣāṣ* laws passed by the Terengganu state assembly, adding that the police force was governed by federal laws and, as such, could not get involved with state-approved criminal legislation.[19]

In Professor Ahmad Ibrahim's assessment, "the citizens of Malaysia, including the Muslims, are not yet convinced of the justice of the Islamic criminal law, and it may be difficult to enact the laws on the Islamic punishments."[20] He then suggested that "the [*ḥudūd*] laws should not be brought into force until all preparations needed for their implementation have been completed."[21] The preparations he referred to primarily related to the necessary amendment of the federal constitution and repeal of the Shariah Courts (Criminal Jurisdiction) Act 1965. He then suggested a voluntary approach to the issue whereby the federal government would enact "the *Ḥudūd, Qiṣāṣ, Diyat* and *Taʿzīr* laws for the purpose of promoting uniformity of laws between the states under Article 76(1)(b) of the Federal Constitution." Such a compilation would help to clarify the *ḥudūd* laws and could be adopted by the Council of Islamic Religion in the federal territories and the states.[22] It was not elaborated, however, how that model should be worked out, a challenge that remained largely unmet.

It is important, of course, that the *ḥudūd* debate is conducted in a spirit of consultation that may generate consensus, supported also by a credible jurisprudential substance and not politicised.

XXI

Problematics of the Hudud Bills

THE POLITICAL LANDSCAPE of Malaysia moved further away from the prospects of developing consensus-based solutions to *ḥudūd* issues when, in the first quarter of 2015, *ḥudūd* became a main issue that led to disintegration of the opposition coalition Pakatan into two separate parties. The splinter party, Parti Amanah Rakyat (National Trust Party), was formed under the leadership of the former deputy president of PAS, Mat Sabu, who did not attach a high priority to *ḥudūd*. The latter part of 2016 and early 2017 saw a certain rapproachement between PAS and then the ruling party UMNO over the introduction in Parliament of a Private Member's Bill (PMB) that sought to empower the State of Kelantan to implement *ḥudūd* punishments in that state. This opened a new context for the *ḥudūd* debate that is discussed below. Here we draw attention to three basic issues over the two *ḥudūd* bills. One of these is over a conflict of jurisdiction and a potential violation of the federal constitution. Then there is the issue whether Malaysia should be governed by two sets of laws, one for Muslims and the other for non-Muslims! Tension is also generated by the fact that only one (i.e., Kelantan as Terengganu is no longer ruled by PAS) of the thirteen states has charted a different path for itself in confronting the national government with difficult choices, which also raises questions over the position of non-Mulims. And lastly, the two bills under review raise questions over the wisdom of a literalist approach to the understanding of *ḥudūd* laws.

Constitutional Issues

The administration of criminal justice and the powers to enact criminal laws in Malaysia is under the purview of the Federal Government, as per

List I, 9th Schedule of the Federal Constitution, much of which is covered under the Penal Code.

Some offences under Hudud Bill of Kelantan (HBK) are also federal law offences, which raises the issue of double jeopardy. Offences such as theft, robbery, homicide, rape, causing bodily harm, and unnatural sex offences have been dealt with by the Penal Code, just as there are provisions in this code that also relate to false accusation, consumption of liquor, and contempt of religion.

In an attempt to overcome this, HBK barred any proceedings or trial under the Penal Code of a person who has been tried for the same offence under HBK (Clause 61). But then it is questionable whether this formula can resolve the conflict that HBK has given rise to in the first place. It is quite unprecedented for the laws of one jurisdiction to prohibit trial under the laws of another jurisdiction, particularly when it is the former that is exceeding the limits of its jurisdiction under the constitution.[1]

In addition, HBK creates a problematic situation when it is made applicable not only to the Muslims of Kelantan but also to non-Muslims. A non-Muslim might elect, according to HBK, "that this Enactment applies to him in respect of any offence committed by him within the state of Kelantan" (Clause 56). Notwithstanding the optional nature of this provision, it is in conflict with the state list of the constitution, which provides that the state can make laws only for "offences by persons professing the religion of Islam." Similarly, the shariah courts can have "jurisdiction only over persons professing the religion of Islam" and with respect only to matters included in the constitution (item 1 of the state list). Moreover, the option given to non-Muslims should preferably be with respect to the entire HBK and not only regarding particular offences. For it is possible that some provisions of HBK, such as those relating to retaliation (*qiṣāṣ*) or even adultery (*zinā*), are advantageous to a non-Muslim (since the proof of *zinā* is exceedingly strict under HBK). The latter should not therefore enable the non-Muslims to pick and choose only such provisions as may be favorable to them.[2]

This was acknowledged by Chief Minister Hadi Awang, who said in December 2002 that the state would not enforce Hudud Bill of Terengganu (HBT) despite having obtained Royal Assent.[3] He said that this was because Terengganu wanted to observe first how such laws were being practiced in other Islamic countries, adding that the state government would send a delegation to Saudi Arabia, Iran, and Sudan for this purpose. The

Federal Territory Mufti, Abdul Kadir Talip, also commented that PAS was ill-prepared to enforce HBT despite its ratification by the state assembly.[4]

In addition, HBK and HBT provided for a range of punishments that are in excess of the limitations Parliament has imposed on the shariah courts. The Shariah Courts (Criminal Jurisdiction) Act 1965 (Act 355), as amended in 1984, restricted the jurisdiction of these courts only to Muslims who may be tried for offences punishable with imprisonment of up to three years, fines of up to RM 5,000, whipping not exceeding six strokes, or any combination of these. The *ḥudūd* punishments are generally above these limits. It is doubtful also whether the Special Shariah Court that is envisaged in HBK could lawfully exercise its functions unless Parliament amends the provisions of the 1965 Act on jurisdictional limits.

To resolve HBK and HBT's conflict with the federal constitution, it was suggested that Parliament should pass an act using article 76A of the constitution specifically to authorize the Kelantan government to enforce the (proposed) laws.[5] In a media article entitled "Resolving the Hudud Law Dilemma," a civil society commentator noted:

> In the event the federal government declares the Hudud Bill unconstitutional, PAS will fault the federal government for obstructing Islamic law. But if the federal government gives its approval, then it stands accused of not carrying out Islamic law in the other states under its control.[6] The then Chief Minister of Kelantan, Nik Aziz, made it clear that "the Bill will not be enforced without prior approval from the federal government."[7] A government spokesman announced in the meantime that "several renowned Muslim experts who were shown a copy of the *ḥudūd* laws passed by the PAS-led Kelantan state government did not agree with the bill saying it was done in haste."[8]

Prime Minister Dr. Mahathir went on to say that the PAS version of the Hudud Bill "punishes victims while actual criminals were often let off with minimum punishment." For instance, if two people, a Muslim and a non-Muslim, committed a crime, the Muslim offender will be punished severely (e.g., having his hands chopped off) while the non-Muslim offender will escape with a light sentence (e.g., a fine or a month's imprisonment).

Mahathir declared, however, that the ruling party "UMNO did not reject *ḥudūd* laws but we (i.e., the federal Government) are rejecting the laws

created by PAS to gain political mileage," thus suggesting that the ruling party and the government were not on the same page over the issue.[9]

The Shariah and Hudud Laws Committee of the Malaysian Bar Council announced in early October 1994 its finding that it had studied HBK and concluded that it was consistent with Islamic law. The committee chairman, Sulaiman Abdullah, said that the inconsistency in certain provisions between *ḥudūd* laws and the federal constitution could be overcome by amending the constitution.[10] The Kelantan chief minister, Nik Aziz, then said that "there was no reason for the Kelantan government to withdraw the *ḥudūd* law unless UMNO was willing to come up with its own version of the law." He offered the observation that "when UMNO has its own *ḥudūd* law, we can compare the two and come to an amicable agreement to choose one of the two and enforce it."[11]

The then law minister, Syed Hamid Albar, stated in a seminar paper presented in Kuala Lumpur that the federal government may introduce a new law "to check inconsistencies" in the legislation of shariah law by state governments. He added that shariah law should be legislated at the federal level and no longer treated as a state matter. The federal government would consult state governments and shariah experts, the minister added, before introducing new legislation, which he referred to as the "Hukum Syarak Act."[12] No further action was taken.

It is instructive also to note a statement by Karpal Singh (d. 2014), then an MP and chairman of the Democratic Action Party (DAP), to the effect that the prosecution must produce four witnesses to prove cases like adultery. This is sometimes impossible for the prosecution, hence "criminals will definitely opt for *ḥudūd*. *Ḥudūd* will only serve to set criminals free and lead to an increase in crime."[13] On another, evidently contrasting note, the president of Malaysia's Bar Council, Lim Chee Wee, commented that bringing *ḥudūd* into the legal system of Malaysia will mean the "importation of Islamic penal laws into laws which ought to be secular." This could give rise to discrimination in criminal justice, as it would mean that the Muslim offender "faces the possibility of stricter punishment under *ḥudūd* for the same offence compared to a non-Muslim offender."[14]

Critics have also commented concerning incest that there are more prosecutions of incest under the Penal Code than under shariah laws of various states because of the differential penalties. Plaintiffs prefer to lodge reports with the police for action under federal law. The maximum penalties for incest in shariah courts is three years in jail, a fine of RM5,000, or six strokes of the rotan.[15] Under the Penal Code, however,

"anyone convicted of incest faces a mandatory minimum of six years jail and not more than 20 years and shall also be liable to whipping." The following figures were reported on incest cases in the federal courts: 1995 (173), 1996 (200), 1997 (223), 1998 (271), and 1999 (260). The number of cases in shariah courts as reported, however, was one each in 1995, 1996, 1997, 2000, and 2002. In 2003 there was also one case and one pending.[16]

Position of Non-Muslims

As already noted, the attempt in HBK and HBT to make the proposed law applicable to Muslims only, and the eclectic method proposed for it, has come under criticism. Some citizens (non-Muslims in this case) are afforded a choice that is denied to the Muslims of Kelantan and Terengganu.

Questions have also arisen over the state of the law when both Muslims and non-Muslims are involved in a case of adultery or theft. The choice of law that is envisaged in Clause 56 of HBK, for instance, gives rise to uncertainties as to which law applies in cases where the victim is of a faith different from that of a criminal or if witnesses to a crime or accomplices therein are non-Muslim.[17]

What if the other party to the offence, whether Muslim or non-Muslim, is a native of another state of Malaysia where *ḥudūd* punishments are not applied? Clearly HBK applies to every Muslim "in respect of any offence committed by him in the state of Kelantan" (Clause 56). Imagine a situation where a resident of Kelantan commits theft just outside the borders of Kelantan or if he chooses to go there for the very purpose of committing adultery, theft, and drinking liquor. Then HBK could be manipulated, and there is little that the government of Kelantan could do to prevent that.

Shariah itself does not provide for such choices, because in most of the *ḥudūd* crimes a difference of religion does not affect the unified application of the law. The only exemptions found in shariah are with regard to the consumption of liquor, which is not an offence with respect to a non-Muslim, and there is no inconsistency in this case as drinking alcohol does not necessarily involve a victim. The same notion applies to apostasy, which cannot be committed by a non-Muslim.

Furthermore, HBK provides that "every person who abets or assists or conspires or plots for the commission of such offence shall be guilty of that offence and shall be liable to be punished with imprisonment as *taʿzīr* punishment for a term not exceeding ten years" (Clause 57). The

terms "abets," "assists," "conspires," and "plots" are broad enough to comprise every possible case in which a non-Muslim might be involved in the perpetration of a *ḥudūd* offence. So in reality HBK is applicable to both Muslims and non-Muslims, especially in cases of abetment and conspiracy, only that with respect to the non-Muslim party and with regards to *ḥudūd,* such as cases of adultery and slander (*zinā* and *qadhf*), the punishment is reduced to *taʿzīr* punishment of up to ten years' imprisonment. But then ten years is off limits according to the stipulated three years of the shariah courts' jurisdiction.

In a Kuala Lumpur seminar held prior to the publication of HBK, of which the present writer was a participant, a non-Muslim speaker stated that "Malaysian non-Muslims fear the imposition of the Shariah," adding that "if less than enlightened and principled understandings of Islam are used to justify attitudes toward, or the treatment of, non-Muslims that fall far short of the Qur'anic ideals...how much worse—we are entitled to wonder—may things become once Shariah law, or rather a certain limited version or understanding of it, is enforced in this country."[18] In voicing their concerns, the non-Muslim community leaders have on the whole spoken positively of the Qur'anic ideals of justice and equality, as well as "the impressive cultural openness, inclusiveness and cosmopolitanism of Islam," but they have warned against restrictive and legalistic approaches towards the implementation of those ideals.[19]

Wan Abdul Muttalib Embong, the State Executive Council member of Terengganu who was on the committee that drafted HBT, was presented with a question: "Is there an Islamic model that allows people of other religions to set up their own legal systems?" Wan Muttalib replied, "You can't come under different systems. One system must provide for all, otherwise you have a state within a state. If the Buddhists start saying they want their own law and their own courts and the Christians say the same, then we will have war."[20]

It may be said, in conclusion, that notwithstanding its Clause 56, which confines the application of HBK to the Muslim residents of Kelantan, Clause 57 tends to cast doubt on on that position. Since every person who abets, assists, conspires, or plots in the perpetration of a *ḥudūd* offence stands guilty of that offence, much would seem to depend on the attitude of judges and law enforcement agencies of Kelantan and Terengganu toward interpretation. Lastly, although the established fiqh across the leading schools of Islamic law precludes the applications of the prescribed

punishment of drinking on non-Muslims, Clause 22 of HBK does not stipulate so, and when this clause is read together with Clause 57, an anomaly might emerge in that drinking (*shurb*) may not be an offence for a non-Muslim; yet abetment, plot, conspiracy, or assistance by a non-Muslim in the perpetration of *shrub* may well be held to be a punishable offence.

XXII

The Ḥudūd *Debate Continued*

UPDATE 2012–2017

TO ENABLE SHARIAH courts to deal with cases of *ḥudūd, qiṣāṣ,* and *diya,* it will be necessary to amend the constitution and to repeal or amend the Shariah Courts (Criminal Jurisdiction) Act 1965.[1] The constitution can only be amended according to certain procedures, but the federal government has not given a clear indication of its willingness to initiate them.

Politicisation of juridical issues has thus become an obstacle in the way of *ijtihād*-oriented efforts. The then Prime Minister Najib Razak was right to say that consensus-based solutions are wanting: "That is why we need ulama to conduct an in-depth study on the viability of implementing *ḥudūd* in the country and to come up with ijtihad and consensus on the matter. We need to make sure that justice, which is the ultimate goal of Islamic law, can be delivered through *ḥudūd*."[2]

In October 2013 the minister responsible for religious affairs in the prime minister's department, Jamil Khir Baharom, announced that a technical committee would be formed at the federal level to study the implementation of *ḥudūd* in Kelantan.

On 18 March 2015, it was announced that the state legislature had passed the *ḥudūd* law amendments. The Kelantan chief minister, Ahmad Yakob, said that these amendments meant that Hudud Bill of Kelantan (HBK) applies to normal (*mukallaf*) Muslims of eighteen years of age and above committing offences in Kelantan. The initial provision that accorded non-Muslims the option to be tried under the 1993 Enactment was abolished. Consequently, the Islamic criminal law cannot be applied to non-Muslims. Also amended was Section 15(2) of HBK by adding the provision for the *taʿzīr* penalty for sodomy offences on the wife. The amendments

also involved section 46 by removing section 46(2) on *qarīnah* or proof of adultery for pregnant women without husbands. The fourth amendment was on the changing of names of courts due to certain new developments in the judiciary.[3] The 2015 amendments also provided, regarding theft, that if the thief became owner of the property before the judgment he would be exempted from the prescribed punishment of theft, although he could still be made liable to *taʿzīr*. Similarly, a thief with only one hand was exempted from losing his other hand. In the case of adultery and sodomy, the new amendments provided for admissibility of testimony (*shahādah*) and evidence (*bayyinah*) in the proof of these offences. Section 46(2) of HBK 1993, which admitted pregnancy and childbirth as proof of *zinā*, was repealed due to the pressure of public opinion on the issue. The 2015 amendments also abolished the provisions of HBK 1993 concerning lesbianism, necrophilia, and bestiality (*musāḥaqah, ityān al-mayyitah,* and *ityān al-bahimah*, respectively). These offences were previously punishable under *taʿzīr* but were now abolished as they were covered by the Penal Code.

It will be noted that the four *ḥudūd* offences mentioned (adultery, drinking, slander, and apostasy) were already present in the shariah criminal codes of most other states, but what set HBK apart is the stiffer punishments for them. For instance, those guilty of drinking (*shurb*) can be punished with forty to eighty lashes, while other states can only punish the same offence with up to six lashes.[4]

A 2014 Gallup Survey (25–31 May) by a state agency in Kelantan revealed that 91.7 percent of the 8,940 Kelantan residents surveyed wanted the *ḥudūd* to be implemented. The survey was conducted after the minister, Jamil Baharom, had announced that "the federal government would support the state's efforts to enforce *ḥudūd*."[5]

Azhar Abdullah, a member of the joint *ḥudūd* technical committee, explained at a forum on *ḥudūd* at Universiti Malaya (1 April 2015) that of all the *ḥudūd* offences, only four—namely adultery, liquor drinking, slander, and apostasy, which are not in the Penal Code—could be implemented. As for theft, murder, and assault, since these are covered in the Penal Code, they will be left out.

The de facto law minister and MP from Sarawak, Nancy Shukri, announced, however, that there was hardly a realistic chance for the proposed Private Member's Bill (PMB) to be adopted, for it was "impossible to implement the Islamic penal code" when provisions for criminal offences were already available in the Penal Code. Besides, "it will never get a single vote from Sarawak lawmakers in Parliament."[6] Another cabinet minister,

Nazri Aziz, said that *ḥudūd* could only be implemented by amending the federal constitution, and this would require a two-thirds majority in Parliament: "No need to dismiss something that will not happen," he said.[7]

Tun Abdul Hamid, the former chief justice, commented that the Kelantan "State Government's strategy is set to make the law first. Then it will try to get the approval of the Parliament under Article 76A(1)." The key question is whether the state legislative assembly can make the law without the prior approval of Parliament. "In my opinion, no, because at the date the State Assembly had no jurisdiction to do so. . . .To me, this law is null and void."[8] Even if subsequent permission is given, it will not make the law a valid law. Supposing that Parliament gives permission, the offences involved will fall under the jurisdiction of the civil courts and will not be included in offences under the State List, because the Ninth Schedule of the Federal Constitution has not been amended to transfer such offences from the Federal List to the State List. Hence the law cannot be made applicable to Muslims only, as is often said by its advocates in Kelantan, simply because it violates article 8 of the federal constitution.[9]

Tun Hamid added that, while in other states criminal law is under federal jurisdiction, applicable to both Muslims and non-Muslims and administered by the civil courts, in Kelantan part of it would be under jurisdiction of the state. Thus it would be applicable only to Muslims and administered by the shariah court, while another part would remain under federal jurisdiction, applicable to both Muslims and non-Muslims and administered by the civil courts. "Is that what the State and federal Governments wish?" Hamid asked.[10]

The then former prime minister, Tun Mahathir, also commented that the PAS ambition to enact *ḥudūd* laws is "used as a ploy to win votes." To create two sets of laws, one for Muslims and the other for non-Muslims was fundamentally unjust "and against the principles of Islam."[11]

On a broader note, the sultan of Perak, Dr. Nazrin Muizzuddin Shah, called for the country's laws to be infused with justice and fairness. Any law without this commitment would fail to fulfil its objectives. Furthermore, the failure to ensure that the law adapts to the times would result in the law becoming either irrelevant or a hindrance to development potentially leading to inequality within the society.[12]

Ḥudūd made headlines again in May 2016 when the PAS president, Abdul Hadi Awang, tabled a Private Member's Bill (PMB) in Parliament proposing to enhance the powers of shariah courts. Hadi Awang added,

however, that the PMB was not meant to introduce *ḥudūd* but to expand the range of punishments that the shariah courts would be able to impose. A PMB only needs the support of a simple majority—112 MPs (of a total of 222 MPs) —or else the majority of MPs sitting at the time the bill comes up for a vote. Additionally, for this bill to become law in Kelantan, the federal constitution (item 1 of List II of the Ninth Schedule) and its Article 76A would need to be amended to extend the legislative powers of the state to enable the handling of criminal cases in shariah courts. And then Article 8 on "Equality" may also call for amendment so as to allow differential treatment of citizens on grounds of religion.[13]

A motion was consequently placed, as a result of Hadi Awang's initiative, on Parliament's working agenda to amend the relevant provisions of Act 355 of 1965. The PAS was in the meantime split into two parties, and the splinter party named Parti Amanah Negara (National Trust Party or PAN, founded 16 September 2015) toned down demand for the implementation of *ḥudūd*. The PAN president Mat Sabu said that "PAN wants to see other issues resolved first and when conditions are conducive to implement the *ḥudūd*, they will do it. To them, there are many considerations [to be taken care of] before implementing *ḥudūd*."[14]

Due to a new rapprochement between PAS and UMNO, the latter did not object to the PMB to expand the powers of shariah courts to impose penalties "to an amount and time period deemed acceptable."[15] Tun Abdul Hamid, former chief justice, commented in the meantime that no bill as such had been made for the purpose: "All we know is the motion which is very brief. So all the discussions are based on the motion," he said.[16] The motion in question seeks to replace section 2 of Act 355 with a new section, which reads:

> The Shariah court shall have jurisdiction over persons professing the religion of Islam in respect of offences regarding matters listed in item 1 of the State List of the Ninth schedule of the Federal Constitution.

A new section (2A) is also proposed to be added, and it provides:

> In dealing with the criminal law under Section (2), the Shariah court is entitled to impose penalties allowed by the Shariah in relation to offences listed under the section mentioned above, other than the death penalty.

All that is needed then is for the state legislature to make a law that empowers the shariah courts to impose punishments permitted by Islamic law. The allegation many have made, Tun Hamid added—that the proposed amendment has nothing to do with *ḥudūd* punishments and is only concerned with court jurisdiction matters—is therefore no more than an empty assertion. Yet even if Hadi Awang's motion succeeds, it remains doubtful, according to another observer, whether the Kelantan government can actually implement the 1993 Enactment and its 2015 amendments.[17]

Then almost unexpectedly came a government announcement on 30 March 2017 that it will not table in Parliament the proposed amendments to Act 355. This was a decision of Barisan Nasional (BN) (the coalition government), which was arrived at in the BN supreme council meeting. The then Prime Minister Najib Razak, who chaired that meeting, said that this was in line "with our policy that BN makes decisions based on consensus," adding that "the bill would consequently remain as a PMB which PAS President and MP Abdul Hadi Awang had moved in Parliament on May 26 last year."[18] It was earlier reported that the government would take over Hadi's PMB and make it a government bill to be tabled in Parliament. Several BN leaders from Sabah and Sarawak (mainly Christian) had voiced objections to the bill, while the presidents of MCA and Gerakan (Chinese) parties had threatened to quit their position in the cabinet if the bill was passed in Parliament. It was further explained by the UMNO information chief, Annuar Musa, that there were still procedural steps and other matters that needed to be done to amend the act.[19] The coalition government was evidently faced with the threat of a split from within and decided therefore to abandon its planned action. The *ḥudūd* debate in Malaysia remained inconclusive as a result.

Then came the somewhat unexpected announcement in July 2017 to say that the State Legislative Assembly of Kelantan passed an amendment to its Shariah Criminal Procedure Enactment 2002 to allow public caning for four shariah offences of *zinā*, false accusation of *zinā*, sodomy, and alcohol consumption—to be applicable to Muslims only. Nassuruddin Daud, State Da'wah, Information and Liaison committee chairman, stated that the amendments have yet to be assented to by the sultan of Kelantan and duly gazetted. Previously the offenders were caned in the prison, but now this will be done in a public place and it will be the first time for Kelantan to practice public caning. Daud added that a total of thirty-three amendments were passed mostly on technical matters: how caning is to be carried out by a prison warden, that it must be witnessed by a Muslim

doctor and at least four Muslim witnesses, what parts of the body that can be caned, the position of men and women when they are caned, how the caning is carried out, and when it can be stopped. "If the doctor sees that the offender is lifeless or in pain after receiving one or two strokes of the rotan, he can order the warden to stop the caning."[20]

It was further announced that public caning will start in two months at which time the gazetting procedure is expected to be completed. The main purpose of public caning was to educate the public, especially the offenders, "as we do not want them to repeat the crime."[21]

Early reactions to these changes were supportive from the state Muftis and government leaders, whereas the Chinese voiced criticism. The Malaysian Chinese Association Religious Harmony Bureau chairman, Ti Lian Ker, commented that PAS was trying to gain political mileage in the runup to the next general election by trying to appease the Muslim electorate, adding also that such punishment fell under the purview of the federal law.[22]

The then deputy prime minister, Ahmad Zahid Hamidi, said that Kelantan had the right to pass the amendment on public caning as they have the majority (in the Kelantan government). He added that public caning would apply only to Muslims and that Parliamentary approval was not required because they are not adding to the number of strokes in caning. Hence Kelantan did not have to wait for the RUU 355 (Shariah Courts Criminal Jurisdiction Act 1965) to be passed in Parliament first.[23]

A minister in the prime minister's department, Jamil Khir [Baharom], said that the Kelantan government's plan for public caning should not be turned into polemics as it merely shifts the venue of punishment from inside the prison to outside it, and it is only applicable to Muslims.[24]

The mufti of Perak, Harussani Zakaria, said that the purpose of public caning was to serve as a reminder to other people. The cane used under shariah law is not the same as in civil cases (canes made of rotan). Under shariah law, a thin cane is used and the person executing the punishment will raise only his forearm when performing the punishment. Zakaria added that public caning had already been implemented in Aceh Indonesia and Saudi Arabia.[25]

PART THREE

Islamic Criminal Law in Other Muslim Countries

Part three provides an overview of developments on Islamic criminal law in fourteen Muslim majority countries. Unlike Malaysia that was covered in greater details and as a showcase in part two, part three provides a general picture of developments on *ḥudūd* and other aspects of Islamic criminal law. But before entering a country-by-country survey, the introduction that immediately follows gives an outline of developments in the colonial and then postcolonial periods pertaining to Islamic criminal law. The colonial legacy presented issues and also influences that provided a backdrop to subsequent developments.

XXIII

Introductory Remarks

THIS INTRODUCTION IS presented in four sections that begin with an overview of Islamic criminal law reform in the nineteenth and twentieth centuries with reference to early developments in Ottoman Turkey, India, and Egypt. Section two is about the Indian Penal Code 1860 that has remained influential in a number of Muslim countries ever since. Section three reviews Islam and Islamic law in the post–Soviet Central Asian republics, and the last section follows on with the emergence of Islamic revivalism in the neighbouring Iran and Afghanistan. These four sections provide a backdrop to the rest of part three that consists of a survey of developments in Islamic criminal law in fourteen Muslim majority countries.

Early Reforms in Ottoman Turkey, India, and Egypt

In the Islamic world, reform of criminal law during the nineteenth century took three forms: complete abolition of Islamic criminal law; reform of Islamic criminal law; and reform of *siyāsah* justice. The first was followed in most colonial states. Here Islamic criminal law was simply abolished and replaced by Western statute law. This was, for instance, done by the French in North Africa. The French penal code, with some changes to adapt it to the colonial situation, was introduced in the Muslim territories over which the French had acquired control.

The second type of reform is the one followed by the British in India and, a century later, in Northern Nigeria. Here, Islamic criminal law continued to be applied but was subjected to a gradual process of change until, in the end, it was abolished and replaced by statute law. This was part of British colonial policy, which emphasised ruling through the existing

power structures. As a result, a type of criminal law emerged that was Islamic only in name. In both countries it was in the end replaced by Western-inspired penal codes.

In India, between 1790 and 1807, the British transformed Islamic criminal law totally. Private prosecution was replaced with prosecution by the state. Anyone who had committed an act of willful homicide could be sentenced to death, regardless of the circumstances. The heirs of the victim in cases of homicide, and the victim himself in cases of wounding, could no longer claim blood money. Culpable homicide and wounding would be punished with imprisonment, whereas in those cases where, under Islamic law, there was liability for the blood money, there would be neither compensation nor imprisonment. The criminal law that was thus created was only formally abolished when, in 1861, the new Indian Penal Code (IPC) was promulgated.[1] The IPC remained influential and was adopted with some modifications by countries such as Pakistan, Malaysia, Nigeria, and Singapore.

The third method is the one chosen by independent Muslim countries with modernising elites, notably the Ottoman Empire and Egypt. Here, the states focused on the reform of *siyāsah* justice and subjected it to some form of the rule of law by codifying it and by creating specialised courts to apply it, whereas Islamic criminal law, without modifications, continued to be implemented through the shariah courts. This dual system of criminal law enforcement came to an end in Egypt in 1883, with the wholesale introduction of French law and creation of a new national court system, and in the Ottoman Empire in 1917, when the new Code of Shariah Procedure of 1917 removed the jurisdiction over homicide and wounding from shariah courts.

Reform of criminal law in the Ottoman Empire was heralded by the 1839 Gulhane Decree, which led to the promulgation of a Penal Code in 1840. The most important feature of this law was the principle of legality: Art. 12(2) stipulated that punishment shall be inflicted only according to the law and that persons against whom nothing has been proven during a trial shall not be punished. Torture during investigation and general confiscation of the property of offenders were outlawed. The aim of the law was to restrict the arbitrariness of *siyāsah* justice that was to be generally regulated by statutory law.[2]

In some independent Muslim states that fell outside the Western sphere of influence, or where the central government was very weak, a traditional system of Islamic justice continued to function for a long

time—as in Saudi Arabia and Yemen—and to a large extent also in Iran and Afghanistan.[3]

Notwithstanding how Islamic criminal law took a different path to modernisation in British India, the Ottoman Empire, and Egypt, the results of the reforms introduced were, in the end, quite similar: the emergence of a body of authoritative and clearly articulated criminal law. In Egypt and the Ottoman Empire, the severe fixed punishments of amputation and stoning to death became obsolete without any express government decree. This happened during the first half of the nineteenth century. Documentary evidence with regard to Egypt shows that, even if lower *qāḍī*s sentenced a defendant to such penalties, higher courts would find grounds to reverse such sentences. They were never officially abolished due to the sensitivity of the subject and likelihood of strong religious opposition. Apparently these considerations did not exist with regard to doing away with flogging and caning, which were abolished by decree in the Ottoman Empire in 1858 and in Egypt in 1861.[4] Egyptian law was based on Islamic law and civil law (particularly French codes). After attaining independence from the Ottoman Empire in matters of legal and judicial administration in 1874, judicial reform began in 1875 and led to the establishment of mixed national courts. Subsequent attempts in Egypt to adopt Islamic criminal law remained inconclusive. Between 1976 and 1982 various parliamentary committees were set up to draft Islamic laws, including an Islamic criminal code. This was partly to demonstrate the Islamic credentials of the state and to repel the ideological attacks of the Islamic opposition. But with the assassination of President Anwar Sadat in 1981, the political climate changed and legislative projects were also shelved.

The Indian Penal Code 1860

The draft of the Indian Penal Code (IPC) was prepared by the First Law Commission, chaired by Thomas Babington Macaulay. Its basis is the law of England, but elements were also derived from the Napoleonic Code and from Edward Livingston's Louisiana Civil Code of 1825. The IPC was passed into law on 6 October 1860 and came into operation on 1 January 1862.

After independence, the IPC was inherited by Pakistan (known as the Pakistan Penal Code) and (now) Bangladesh, formerly part of British India. It was also adopted wholesale by the British colonial authorities in Burma, Sri Lanka, Malaysia, Singapore, and Brunei, and it remains the basis of the criminal codes in those countries. David Moussa Pidcock, who

wrote the book *Napoleon and Islam*, interestingly said that 96 percent of the Napoleonic Code came from the rulings of Imam Mālik. If there is merit in this claim, it must have something to do with Napoleon's Egyptian campaign.[5] The adoption of the IPC thus transcended religion: Pakistan, Bangladesh, Brunei, and Malaysia are not only Muslim-majority countries but also Islamic countries. Sri Lanka and Myanmar (formerly Burma) have Buddhism as their state religion, while Singapore is a modern cosmopolitan nation-state.

Among the Islamic countries that inherited the IPC from the British rule, Malaysia is "happy to keep it as it was introduced except for the unavoidable amendments necessitated by time and place." Bangladesh too seems to have made little changes to the IPC. Brunei, in its quest to be shariah-compliant, had been struggling for the past thirty years to Islamize its penal code, and it introduced some changes in 2015. On the other hand, Pakistan, where politics play a more powerful role than in Brunei, has gone further. It has Islamized its Penal Code.[6]

One would have thought that penal codes would have been replaced totally with new Islamic criminal law. Yet without going into details, in Pakistan, the IPC remains intact. The name, the language, the structure, and the style, even the contents, remain unchanged. They were retained presumably because they were not contrary to shariah.

New sections were added, however, to provide for the introduction of shariah punishments in Pakistan like *qiṣāṣ, diya, arṣh, ḍaman*, and *taʿzīr* (Section 53). There are major amendments in Chapter XVI, "Of Offences Affecting the Human Body." And there are also lengthy additions on causing hurt and the various punishments they invoked.[7]

Islam in Central Asia

Islam reached Central Asia during the mid-seventh century, and within some fifty years, Transoxiana was co-opted into the Islamic Caliphate. The roots of Islamic faith were further strengthened during the Karakhanid and Seljuk empires. Central Asian Islamic scholarship during the medieval period was strong and distinctive and left an indelible mark on the Muslim world. In the eighteenth century, Tsarist penetration started in the region, and the conquest of the Khanates began with the fall of Tashkent in 1865. Bukhara and Khiva became protectorates in 1868 and 1873, respectively; Kokand was integrated into the Russian Empire in 1876, and Turkmenistan in the 1880s.

The Soviet Union was a federation of fifteen communist republics, which lasted from 1922 until its dissolution in 1991. Six of the fifteen republics had a Muslim majority: Azerbaijan SSR, Kazakh SSR, Kirghiz SSR, Tajik SSR, Turkman SSR, and Uzbek SSR. A large number of Tatar Muslims also lived in Siberia and other regions. The majority of the Muslims within the USSR were Sunnis, and about 10 percent were Shii Muslims who mostly lived in Azerbaijan. An estimated fifty million people identified themselves as Muslims. After 1991, Central Asian Muslims who had been forced to renounce or hide their religion for seventy-four years were able to reconnect themselves with their Islamic past. Yet Soviet law forbade Islamic religious activity outside of the mosques and Islamic schools.[8]

There is an Islamic revival in Central Asia, which is, however, almost exclusively concerned with matters of ritual knowledge, religious beliefs, and practices and not with legal or political mobilisation. The general public is somewhat isolated from the world outside the former Soviet orbit. The former Communist and now nationalist ruling elites remained hostile toward Islamic political ideals and movements.[9] As Nazif Shahrani commented, the most significant achievement of Soviet colonial rule in Central Asia may well have been the extent of its success in "colonising the minds and consciousness of the people of Central Asia." The predicament of Central Asians under Soviet rule was succinctly described by Islam Karimov, the then president Uzbekistan in 1991, who said, "endowed properties belonging to Muslim religious institutions [*awqaf*] were confiscated, Muslim shariah laws abrogated, and mosques, madrasah-maktabs (mosque schools) and shrines were destroyed or desecrated."[10]

Broadly, Islamic law was in force in these republics until 1920 but ceased to be applied under Soviet rule. At the present time, officially Islamic law has no influence on civil or criminal laws in almost all the Muslim republics. In these republics, civil law and criminal law rely largely on Soviet law with minor changes since independence. There is also no evidence of informal shariah courts or Qur'anic punishments (*ḥudūd*).[11]

Iran and Afghanistan

Two momentous events occurred in 1979, one of which was the Soviet invasion of Afghanistan and the other the Islamic revolution of Iran. Both events provided fresh impetus for Islamic revivalism and gave rise, in turn, to demands for an Islamic state and *ḥudūd* in many Muslim countries.

The renewed Islamic consciousness of the early 1980s was mostly at the expense, or partial replacement, of ideologies espousing Arab nationalism and socialism in one form or another. Resistance to the Soviet occupation gained momentum in Afghanistan mainly from an Islamic platform. The Islamic revolution in Iran was similarly launched in the name of Islam, which, like most revolutions, gave rise to political uncertainty and upheaval, as was also true in the case of Afghanistan. The events in Iran and elsewhere in the Muslim world were not merely a reaction against the domination and culture of the West but also part of a broader movement that was driven by a multitude of factors.[12]

These factors included disenchantment with secular models of development in many postindependence Muslim nations, in particular socialist models. The calls to implement Islamic criminal law (ICL) in the Muslim world were part of a broader quest for dignity and identity and rejection of the colonial legacy. In what follows, we look at some Muslim countries that tried in one way or another to implement shariah punishments. An examination of the details shows that almost each one of these cases have faced challenges that came in the way of effective implementation of the punishments. The number of countries reviewed here is fairly limited. An overview is thus provided of related developments in the Indonesian province of Aceh, the Islamic Sultanate of Brunei Darussalam, the Kingdom of Saudi Arabia, and the Islamic Republics of Afghanistan, Pakistan, Iran, Mauritania, Yemen, and Maldives. We also look at *ḥudūd*-related developments in the Republics of Sudan, Nigeria Libya, the United Arab Emirates (UAE), and Qatar.

This comparative review attempts, in each case, to ascertain milestones of development and significant positions taken on the ICL, in particular *ḥudūd*, with coverage, as far as possible, of actual or suggested measures and plans. As has been mentioned, *ḥudūd* punishments tend to touch on religious sensitivities in most Muslim countries and are mostly politicised, and thus they pose difficulties as to the accuracy of available information one can secure on them. Another factor is opposition from the international community and human rights activists. In places where shariah courts and jurisdictions exist to adjudicate *ḥudūd*, judges and lawyers exhibit reservations on discussing issues openly. Judges are also reluctant to pass *ḥudūd* sentences due to their severity and in some cases, as in Malaysia, due to constitutional issues and insufficiency or lack of jurisdiction. The picture one gets is thus uneven in that each country presents a set of dynamics often peculiar to its own sociopolitical environment.

Many of the countries reviewed also tend to have a two-track system of courts consisting of shariah courts and civil courts, the latter of which are courts of general jurisdiction in such countries as Brunei, Malaysia, Nigeria, the Sudan, and Pakistan. They mostly tend to have two sets of laws as a result: a penal code that is meant for the whole populace, Muslims and non-Muslims alike; and a separate set of shariah laws, inclusive sometimes but not always of *ḥudūd*. Complications tend to arise over conflicts of jurisdiction as well as legacy issues due to the domination of the common law system that still characterises the judicial systems in these countries. Unresolved issues are thus encountered in regard to the methods of proof that differ, at least partially, in shariah and civil courts. These are also among the issues that also lead to excessive delays in the settlement of disputes before the courts.

On a broader note, the three models of nineteenth-century developments concerning Islamic criminal law in the Muslim world, discussed above (i.e., total exclusion of shariah, selective reform, and *siyāsah* justice) also influenced subsequent developments in the postcolonial period. Only after the so-called Islamic revivalism of the latter part of twentieth century, total exclusion of shariah was effectively abandoned, and a mixed pattern of selective reform of shariah and modern law side by side became the principal approach. Constitutionalism, codification and rule of law were continued with renewed emphasis, but new reforms also exhibited greater harmony with shariah. A blend of Islamic and British law came about in India that was known as Anglo-Muhammadan law. Basic tenets of Western law that influenced developments also included the principle of legality: there can be no crime or punishment except by law (*nullum crimen sine lege, nulla poena sine lege*), nonretroactivity of laws, and the principle of territoriality of jurisdiction.[13]

An overview of developments in Islamic criminal law, especially *ḥudūd* crimes, that follows begins with Aceh and proceeds with Brunei Darussalam, Saudi Arabia, Afghanistan, and a number of other Muslim-majority countries.

XXIV

Qanun Jinayat *of Aceh, Indonesia*

THIS RELATIVELY DETAILED account of the introduction of *Qanun Jinayat* (Islamic criminal law) in Aceh reveals many similarities with the experience of HBK 1993 of Malaysia. Yet unlike Malaysia, which is a federal state with various states that have their own legislative assemblies, Indonesia is a centralised administration, and only Aceh has been granted a special autonomous status under the Aceh Special Autonomy Law of 1999. This was further elaborated later in the 2006 Law No. 11 on Aceh Government, explicitly stating that the government of Aceh has the authority to organise religious life in accordance with the Islamic religion for Muslims without disrupting interreligious harmony. A dual system of civil courts with general jurisdiction, and shariah courts with specialised jurisdiction obtains in both countries, and they both have criminal or penal codes that apply generally to the whole of their respective countries and also cover some *ḥudūd* crimes—hence there is a degree of duplication of laws in both scenarios.

Indonesian law on shariah is generally vague, however, and has developed in different directions. The constitution of Indonesia 1945 states that the Muslim-majority nation is secular, but the national parliament in Jakarta in 2003 passed legislation that allowed shariah to be implemented for Aceh's five million populace. Since then several local district governments in Indonesia have in one way or another followed suit. Although Indonesia has 190 million Muslims, the country has historically been liberal in many ways, allowing bars, nightclubs, and the sale of alcohol in the country.[1] Reports in 2015 indicate, however, that Indonesia has also introduced restrictions on the sale of alcohol in retail shops around the country on health and moral grounds, due to concerns that underage drinking is being fueled by the wide availability of alcohol in local neighbourhoods. Fahira Idris, a lawmaker and founder of the National Anti-Alcohol Movement, likened alcohol to a "machine killing our youth."[2]

Reports further added, however, that the Trade Minister Rachmat Gobel "was shouted at" during a meeting with community leaders in the mainly Hindu-populated island of Bali and "has now pledged to ease the restrictions on the island to ensure street vendors can still sell beer at the beach."[3]

Aceh is in many ways an exception as it is said to be Indonesia's most devout Islamic province, having first received Islam through Arab and Indian traders sometime around 800 CE. It was from here that Islam spread to the rest of the archipelago from about the thirteenth century onwards. That may explain why Aceh was nicknamed *Serambi Mekkah* ("Veranda of Mecca") by Arab traders. Islam has consequently become deeply entrenched in Aceh society, which is described as locally defined, externally focused, and open to external influences of a more tolerant type.

Like most of Southeast Asia, Islamic Aceh is predominantly Sunni and follows the Shāfiʿī school or *madhhab*, except for a minority of about 15 percent Shia; yet there are differences of interpretation among the Sunni Shāfiʿīs within Aceh. Residents of the somewhat remote west Aceh tend to be more conservative, whereas liberal currents of opinion are found within the densely populated eastern and northern parts of the province.[4]

One of the key characteristics of the Aceh province is that the moral basis of social codes of behaviour derives from Islam. Islamic values and laws, spread and formulated by the ulama, have been a way of life of the Aceh people since the times of Aceh Sultanates.[5] Yet the status of Islam in Aceh is somewhat confused by what some observers have called "the externally driven introduction of shariah," which included Islamic legal codes, primarily referring to moral issues, along with the existing civil laws.[6]

On 14 September 2009, two weeks before its tenure was due to expire, the outgoing legislature of Banda Aceh passed the *Qanun jinayat* (Islamic criminal law). By doing so, the outgoing state legislature "breached fundamental democratic principles,"[7] in that it passed legislation just before the swearing in of a newly elected legislature. The commonly expressed view was that shariah was imposed as a "divide and conquer" tactic by the Indonesian military at the peak of the Aceh war. The idea was to create a division between the Free Aceh Movement (Gerakan Aceh Merdeka or GAM), which saw its war as one of national liberation and not over Islam, and the province's otherwise supportive religious leaders and Imams, who would be obliged to accept shariah. The *Qanun jinayat* consequently became moot among the Acehnese since it was not reflective of the expressed choice of the people of Aceh. The failure to sign *Qanun jinayat* into law or the possibility of its ultimately being rejected by the new provincial legislature raised almost no public concern in Aceh. It was not an issue in the February 2012

gubernatorial election campaign either, indicating that no one seeking election for public office would risk his reputation with such a sensitive issue.

However, *Qanun jinayat* was approved by the Aceh House of Representatives, known as DPRA, in September 2014, in order to implement shariah.[8] This *Qanun jinayat* is a revised version of the 2009 *qanun*, which became controversial due to the introduction of stoning to death as a punishment for adultery. Under the *Qanun jinayat* 2014 (Art. 129), non-Muslims in Aceh can choose to submit themselves to *Qanun jinayat* voluntarily when committing *jinayat* crimes with Muslims, but when committing crimes not regulated under the 1981 Law of Criminal Procedure (KUPH), they must submit to *Qanun jinayat*. Aceh residents who commit *Qanun jinayat* crimes outside Aceh must submit to KUPH.[9]

The head of Wilayatul Hisbah, Samsuddin, told Benar News: "We printed 8,000 brochures containing a summary of penalties in the *qanun jinayat* so it would be easy for the public to understand. In early May 2015, we're going to distribute them so people won't be surprised when it's implemented." Al Yasa' Abubakar, head of the Islamic Shariah Agency and head also of Muhammadiyah Aceh, who participated in the DPRA deliberations, said that implementation was set to be in one year in order to provide enough time to inform the public and prepare enforcement officials: "When it is implemented, the hope is that Acehnese people will no longer violate Shariah of Islam."[10] The *Qanun jinayat* was expected to go into effect one year after its passage by the DPRA.[11]

However, Teungku Faisal Ali, the chairman of Nahdlatul Ulama (lit., "Awakening of Religious Scholars," one of the two largest popular movements) of Indonesia believes that the bylaws had failed to have a substantial effect on Acehnese society because they were not strong enough and also because there is lack of political will by local governments. He said that conditions today and five years ago are about the same. Shariah has been going nowhere in terms of regulations and enforcement, and he is of the opinion that the bylaws on crimes cannot be implemented to this day because there are punishment clauses considered controversial.[12]

The *Qanun jinayat* that was passed by the outgoing provincial legislature 2009 included the following:

- Adultery: "Any person who deliberately commits adultery is punished with 100 cane lashes for the unmarried and stoning to death for those who are married."

- Homosexuality: "Any person who deliberately performs homosexuality or lesbianism is punished with up to one hundred cane lashes and a maximum of 1,000 grams of fine gold or imprisonment of up to 100 months."
- Paedophilia: "Any person who deliberately commits a sexual crime against children is punished with a variable sentence of up to 200 cane lashes and a fine of up to 2,000 grams of fine gold, or maximum imprisonment of 200 months."
- Rape: "Any person who deliberately commits rape is punished with at least 100 cane lashes and a maximum of 300 cane lashes or imprisonment of at least one hundred months and a maximum of 200 months."

It was not clear at any point what Islamic sources were consulted in the drafting of this legislation, or why the various penalties imposed were not consistent with shariah law as understood in the neighbouring countries. The structure of punishments, especially the number of lashes in *Qanun jinayat*, are far in excess of those found in the scriptural sources of shariah. "Although some legislators expressed concern over the legislation, when it was put to the vote, all legislators voted in its favour."[13] The view was expressed by "two senior Acehnese politicians" that dissenting legislators could not openly oppose the bill because their opposition would then be used to challenge their commitment to Islam. *Qanun jinayat* 2009 was opposed by Aceh civil society groups as well as senior provincial government officials. Many of its provisions on penalties were in conflict with the Penal Code of Indonesia by either exceeding the Penal Code specifications or making parallel provisions to the same offences.

It is noteworthy that, in practice, the implementation of *ḥudūd* penalties is quite different in Aceh. The shariah court of Aceh ordered a uniform punishment of eight lashes of the whip for *ḥudūd* offences, excluding theft and *zinā*. Most of the other *ḥudūd* offences are thus penalised with reduced penalties to what is listed for them in the fiqh sources. Part of the explanation is that *ḥudūd* penalties are seen as the upper limits of punishment for the offences concerned, and the upper levels of punishments are reserved for the most severe cases. But they are otherwise understood to carry moral opprobrium, and that purpose is achieved through a uniform punishment of eight lashes and publicity that brings shame to the offender.[14]

Aceh is thus caught in a similar predicament to that of Kelantan in Malaysia, both taking an exception to the rest of their respective mother

countries. Even though the people of Aceh are considered among the most devout Muslims in Indonesia, the province had not officially implemented shariah or *ḥudūd* punishments before. That is why both foreign and Acehnese activists were somewhat surprised with the introduction of *Qanun jinayat* and shariah police activities. There were instances in the past when hundreds of Acehnese women marched through the capital, demanding nondiscriminatory implementation of shariah and an end to heavy-handed tactics by enforcement officers.[15] A point of complaint has also been recorded on the "formalisation" of Islamic law as a new and in some ways unwanted development in Aceh. Marcen Naga observed in this connection that Islamic values had historically become a part of life and were observed by the people of Aceh since the times of Aceh sultanates in the thirteenth century CE. Instead of strengthening these features, their formalisation in codified laws by the state could weaken the degree to which Islam is practised by the Acehnese, who might regard these Islamic aspects as being forced upon them without choice, ignoring their individual agency in adhering to Islam.[16] In a similar vein, Moch Ichwan pointed at what is termed as "shariatism" by "progressive Muslim intellectuals, feminists, and queer residents of Aceh." They have developed "non-shariah spaces" and "alternative politics" in Aceh, essential for the future of Islamic democracy, under the rubric of "plural democracies" in Aceh.[17]

As already indicated, during the five years' interval between ratification of the *Qanun jinayat* 2009 by the Aceh House of Representatives (DPRA) and issuance of the revised *Qanun jinayat* in 2014, with its final ratification by both the DPRA and the governor, the *qanun* was stopped at the executive level due to tensions in the general public with regard to its punishments, especially regarding its provision on stoning to death for married adulterers. During extended discussions between all the concerned parties in that period, the governor of Aceh at the time, Irwandi Yusuf, stated that this punishment was disruptive of Aceh's peace and was upsetting the international investment community. Scholarly opinion of the ulama of earlier times was also cited to the effect that this punishment was not to be taken lightly. Irwandi's vice governor, Muhammad Nazar, added that even the *ḥudūd* punishments of flogging should be reduced and preferably replaced with *taʿzīr* to consist of imprisonment and fines, reasoning that this was more suited to the current Aceh society. Two Islamic Shariah Agency heads, Al Yasa' Abubakar and Shahrizal Abbas, mentioned that the stoning (*rajm*) punishment was included unilaterally by the DPRA based only on general opinion or public input and without government

consultation or sufficient scholarly study. After much deliberation, the stoning (*rajm*) clause was finally removed, but the *ḥudūd* clauses on flogging were retained in the ratified version of the *qanun*. It was mentioned in this connection that flogging was still practised as a punishment in the United Kingdom and the United States.[18] Even after the ratification of *Qanun jinayat* in 2014, it is common to hear differences of opinion and the rhetoric that foreign hands and the enemies of Islam are hard at work to revoke the *qānūn*.

Qanun jinayat Aceh (2014) consists of ten chapters and seventy-five articles (in twenty-three pages). The introductory and opening sections provide an overview of sociological and juridical considerations and the steps taken that led to its final ratification. Of the ten chapters, the longest is chapter IV on criminal offence and punishment (fifty articles), whereas the remaining nine chapters all occupy twenty-five articles.[19]

The fifty articles in chapter IV specify in detail the offences and punishments that fall under the purview of the *qanun* in ten separate segments, with three articles on drinking (*khamar*), five articles on gambling (*maisir*), two articles on illicit privacy (*khalwat*), eight articles on sexual promiscuity (*ikhtilāt*), thirteen articles on adultery and fornication (*zinā*), two articles on sexual harassment (*pelecehan seksual*), seven articles on rape (*pemerkosaan*), six articles on slander (*qazaf*), two articles on homosexuality (*liwāṭ*), and one article on lesbianism (*musāḥaqah*).

Qanun Jinayat *Goes to the Supreme Court*

After a year of the *Qanun*'s obligatory period of "socialisation," it became enforceable in 2015, but it was soon followed by a landmark case in which two civil society organisations, the Institute for Criminal Justice Reform (ICJR) and United Women Solidarity (UWS), filed a petition at the Indonesian Supreme Court. The plaintiffs demanded that *Qanun jinayat Aceh* be revoked on grounds of unconstitutionality, and they provided details in a sixty-page statement as well as a long list of arguments for their demands. Included in these was the *qanun*'s opposition to ten other Indonesian laws of superior status to that of the *Qanun jinayat,* which was a bylaw passed by the provincial legislature, not an Act of Parliament. The discussion here need not elaborate much on the details of that sixty-page petition for reasons that will presently become obvious. What may be said at this juncture, however, is that the plaintiffs critiqued the *qanun* provisions that required the rape victim to provide proof to support her charge.

This, they asserted, was a violation of Article 52(1) of Indonesia's Criminal Procedural Law 1981 and the 1999 Law (No. 39) on Human Rights. It was further stated that a phrase in the *qanun*, "guilt admission by the perpetrator," infringed the principle of "non-self-incrimination" stipulated in the 2005 Law (No. 12) on ICCPR (International Covenant of Civil and Political Rights), the Civil Code of Indonesia, and the 2009 Law (No. 12) on Judicial Power. The plaintiffs further argued that taking an oath is admissible evidence under Articles 52 and 56 of the *Qanun jinayat*, which is, however, not recognised as proof in Indonesia's criminal justice system—although it is so recognised in the context of civil litigation. Logic dictates, it was added, that "every criminal will take the oath if given the option to exonerate himself." Further adding to the list of critiques, the plaintiffs stated that the provisions of the *qanun* in its sections on sexual offences (e.g., Art. 36) created scenarios in which pregnancy of an unmarried woman is taken as proof of *zinā* against her.

The Aceh government in its capacity as the defendant used the Autonomy Law No. 11 of 2006 on Aceh Government, stating that it had amended the provisions of the *qanun* so as to afford non-Muslims a certain choice as to whether or not to be adjudicated under the *qanun*.[20] The Aceh government further stated that the *qanun* had undergone the required legal procedures that were necessary for a law to be passed in Aceh. Included among these were several steps toward its preparation. The steps so taken were preparation of an Academic Draft, along with the Aceh Qanun Draft, the Aceh Legislation Programme procedure, the Aceh Government Team Discussion with Aceh House of Representatives (DPRA), an Interior Ministry Consultation, a General Hearing Meeting attended by all Aceh stakeholders, and DPRA approval. Following this, it was added that the *qanun* had also been submitted to the Interior Ministry of Indonesia, which did not provide any comment or critique after sixty days of submission. The *qanun* became official Aceh law.[21] Thus it was asserted that it was a valid law in every respect.

The Supreme Court finally issued a ten-page decision and rejected the application on what was basically a technical ground, holding that the *qanun* review at the Supreme Court at the given time was "premature." The main reason for this was that one of the ten regulations the plaintiffs had mentioned and relied upon, namely the 2011 Law No. 12 on Law Formation, was still under review by the Indonesian Constitutional Court with the registration number 59/PUU-XIII/2015. The Supreme Court panel of judges further added that the 2003 Law No. 24 (Art. 55) on

the Constitutional Court stipulated that the review of regulations under the level of law in the Supreme Court must be halted when the laws that are being used as the basis of the review are themselves under review in the Constitutional Court—until the latter had decided on its review. The Supreme Court thus decided that the application cannot yet be considered and the plaintiffs were ordered to pay the application fee of one million rupiah. There was little public response. Although one or two members of the DPRA were quoted to have welcomed the Supreme Court decision, there has generally been little coverage in the media of the Supreme Court's rejection. Notably, only the ICJR uploaded the Supreme Court decision on its website.[22]

Subsequent information on the enforcement aspect of *ḥudūd* in Aceh indicates that instances of arbitrary enforcement occur now and then. An example of this may be an occurrence on 14 April 2016 when a Christian woman was whipped thirty lashes for selling alcohol in Banda Aceh. This is considered to be the first instance where a non-Muslim was punished under Islamic criminal law. Reports also indicate that a Muslim couple was whipped 100 lashes for committing adultery at around the same time.[23] There are complaints also that the law enforcement agencies should go after more substantive public crimes, such as corruption, nepotism, collusion, and complicity, instead of only perceived private and sex-related crimes.

XXV

Shariah Penal Code in the Islamic Sultanate of Brunei Darussalam

THE SULTAN OF Brunei, Hassanal Bolkiah, made a widely publicised announcement on 22 October 2013 that immediately became a worldwide media event. The sultan announced on that occasion that a new shariah penal code, which was in the works for years, had been gazetted and would come into force in phases over the next six months. He added that, based on the details of particular cases, punishments could include amputation for theft, stoning for adultery, and flogging for violations ranging from abortion to consumption of alcohol.[1] The sultan, who has reigned since 1967, is Brunei's head of state and prime minister with full executive powers. Public criticism of his policies is extremely rare in Brunei.

The sultan said in his initial speech on the subject that the shariah penal code in Brunei would be applied to Muslims only, and that Brunei's initiative in this regard should be seen as a form of "special guidance from Allah." To quote the sultan: "By the grace of Allah, with the coming into effect of this legislation, our duty to Allah is therefore being fulfilled." The sultan said this at a legal conference in Brunei's capital Darussalam. Brunei was a British protectorate until 1984, and it had as such ceased to apply Islamic criminal law, including *ḥudūd*. Although the shariah, or Islamic, courts had previously existed in Brunei even under the British, they handled mainly family-related disputes. Even to this day, and somewhat similar to Malaysia, Brunei has a dual-track judicial system combining civil courts based on British law.

Two years preceding the sultan's 2013 announcement, a top official in the attorney general's office stated that Brunei would apply an extremely high standard of proof for shariah criminal infractions under the code and

that judges would have wide discretion in applying Islamic punishments.[2] This last point—that is, giving judges wide discretion in the implementation of *ḥudūd*—is a new development that marks a departure from the theoretical blueprint of *ḥudūd* that was discussed in part one.

The longstanding awareness and concern in the Islamic State of Brunei over the implementation of *ḥudūd* is also shown by the fact that, back in 1996, the sultan had first called for the introduction of shariah criminal punishments in Brunei, where Muslims comprise about two-thirds of the population of nearly 420,000 people. The minorities are mainly Buddhist, Christians, and people of local indigenous beliefs.

Following the sultan's announcement on *ḥudūd*, Brunei's mufti, Awang Abdul Aziz (also the country's top Islamic scholar), made a statement at a press conference to the effect that the shariah law "guarantees justice for everyone and safeguards their well-being." The mufti then added:

> Let us not just look at the hand-cutting or the stoning or the caning per se, but let us also look at the conditions governing them. ... It is not indiscriminate cutting or stoning or caning. There are conditions and there are methods that are just and fair.[3]

Mufti Awang also offered assurance that foreign travellers and tourists should not be concerned about shariah law or avoid Brunei after the law was implemented:

> Please listen to our answer: do all potential tourists to Brunei plan to steal? If they do not, then what do they need to fear. ... Believe me when I say that with our shariah criminal law, everyone, including tourists, will receive proper protection.

The implementation of shariah criminal law was not expected to face vocal opposition in Brunei, which has long been known for conservative policies such as banning the public sale of liquor. Under secular laws, Brunei had also prescribed caning as a penalty for crimes including immigration offences, for which convicts could be flogged with a rattan cane (*rotan* in the Malay language).

On 22 April 2014, it was announced that Brunei had postponed the proposed implementation of Islamic criminal punishments that were due to begin on that day. The delay was due partly to widespread negative media coverage abroad, international pressure, and the occurrence of criticism at

home. No confirmed new date was given for the start of the shariah penalties, but an official told the Brunei media that they would begin "in the very near future." Jauyah Zaini, assistant director of the sultanate's Islamic Legal Unit, was quoted by the *Brunei Times* as saying that implementation had been delayed "due to unavoidable circumstances." He did not elaborate nor provide a new date.[4]

Then on 30 April 2014 the sultan of Brunei announced that the new Islamic criminal punishments would be phased in starting on the following day.[5] "Today I place my faith in and am grateful to Allah the Almighty to announce that tomorrow, Thursday, 1 May 2014, will see the enforcement of shariah law phase one, to be followed by the other phases." The sultan added that shariah law penalties would be introduced over time, and eventually the penalties would include flogging, severing of limbs, and death by stoning for various crimes. In response to foreign criticism, the sultan said: "Critics state that Allah's law is harsh and unfair, but Allah Himself has said that His law is indeed fair."[6]

On 1 April 2015 (i.e., one year after the sultan's announcement), Tun Hamid, the former chief justice of Malaysia, presented a lecture in Kuala Lumpur on Islamic criminal law in Malaysia. He made the following remarks on developments in Brunei:

> First of all, I would like to correct a common mistake. Many people thought that Brunei has implemented *ḥudūd* laws. That is not correct. In fact, to this day, Brunei has yet to enforce that part of the Shariah Penal Code Order 2013 which contains *ḥudūd* offences. Brunei has gazetted the law. The effective date has not been fixed yet. The most recent information I received from the Assistant Solicitor General of Brunei on 15 December 2014 confirmed that the *ḥudūd* law had not been enforced. In fact, the provisions of the Criminal Procedure Code necessary for the implementation are still under discussion.[7]

Matters became more complex than were initially thought. Pressure from international opinion and internal factors were behind the repeated delays in the implementation of *ḥudūd* in Brunei.

Subsequent information that came to light indicates, however, that the core *ḥudūd* penalties have been postponed to a later stage but that some of the lighter aspects thereof, which are strictly not included in *ḥudūd*, have

been introduced and labelled as "the first phase" of Islamic criminal law. Reports thus indicate that this phase of the enforcement had started:

> The first phase, introduced on 1 May 2014, includes fines, imprisonment or both for eating, drinking or smoking during fasting hours, skipping Friday prayers for men and giving birth out of wedlock. According to some reports fewer than 20 people have been convicted for smoking during Ramadan and for *Khalwat* (intimate proximity offence). All of these offenders were fined.

However, the second phase, which includes whipping and the amputation of limbs, has yet to be implemented. It will be followed by the third and final phase, which allows for the stoning of those found guilty of homosexuality and adultery.

XXVI

Islamic Criminal Law in Saudi Arabia

ON 1 MARCH 1992, King Fahad announced the following three fundamental laws, established by Royal Orders, which changed the domestic legal and political environment of Saudi Arabia:

- The Basic System of Governance (hereafter referred to as the Basic Law);
- The Consultative Council Law; and
- The Regional Law.

The Basic Law (BL) is the most important. Article 7 of the law states that the Qur'an and the Sunnah govern all administrative regulations of the state as well the nature, the objectives, and the responsibilities of the state organs. Thus the relationship between the ruler and the ruled will be based on consultation, friendship, and cooperation.

The BL also confirms the monarchy side by side with the state's commitment to the principles of justice and the equality of citizens under Islamic shariah. The law then defines the authority of the three organs of state—the judiciary, the executive, and the legislative—along with their interrelationships. However, there is no expressed commitment to the separation of powers as such, especially between the legislative and the executive branches. The legislative authority is shared by the king, the council of ministers, and the Consultative Council (Majlis al-Shūrā). The BL also declares that Islamic shariah will be the basis of legislation, and there are numerous statutory laws governing criminal, administrative, and commercial affairs in the country. In his capacity as the enforcer of divine law, the king enjoys extensive powers over government affairs

relating especially to Islamic public policy (*al-siyāsah al-sharʿiyyah*) and public interest (*al-maṣlaḥah al-mursalah*).

Introduced in 1993, the Consultative Council (Majlis al-Shūrā) had 61 appointed members and the number increased to 90 in 1996. Although the Majlis has no legislative powers, it can examine government policies and propose laws or amendments to existing laws. Decisions or suggestions from the Majlis are first sent to the council of ministers for review and then to the king for his approval.[1]

The BL also declares that the king must comply with shariah. Criminal law comprises three categories of crimes and penalties: *ḥudūd* (fixed Qur'anic punishments for specific crimes), *qiṣāṣ* (retaliatory punishments), and *taʿzīr* (a general category). *Ḥudūd* crimes are the most serious and include theft, robbery, blasphemy, apostasy, adultery, sodomy, and fornication. *Qiṣāṣ* crimes include murder and bodily injuries.

Since the Qur'an and Sunnah require interpretation, it is usually provided by the ulama. The Board of Senior Ulama (BSU), an official body of thirty to forty of the kingdom's most senior scholars, heads the religious authority in the Kingdom of Saudi Arabia (KSA). Created in 1971, it provides fatwas on issues submitted to it by the government or that require the establishment of general rules. The BL recognises the existence of this board. It states that "the sources for fatwa (religious legal opinion) in the Kingdom of Saudi Arabia shall be the Book of God and the Sunnah of His Messenger. The Law shall set forth the hierarchy and jurisdiction of BSU and the Department of Religious Research and Fatwa." The BSU has been a participant in the legislative process, which has in many cases been crucial in gaining public support for the statutory laws. Similar bodies exist at the regional level, though they are characterised by a more academic composition and functions. They include the Islamic Fiqh Academy at the Muslim World League, sponsored by Saudi Arabia and located in Mecca, and the Jeddah-based International Islamic Fiqh Academy of the Organization of Islamic Cooperation.

The public prosecutor's office was instituted in 1989 in order to modernise the Saudi judicial system. A code of criminal procedure of 225 articles was introduced in 2001 and contains provisions taken from Egyptian and French law.

A central principle of this law was a requirement that the accused could only be convicted of a crime that was identified in shariah or government

regulations and that due process needed to be followed before a conviction could be handed down. The law also prohibits torture and gives the accused the right to a lawyer.

Currently, Saudi Arabia has a dual judicial system composed of shariah courts and an independent administrative judiciary introduced in 2008 and operating under the Board of Grievances (Diwan al-Mazalim).[2] In addition there are several administrative committees that have jurisdiction to hear certain specified cases. Moreover, the Law of the Judiciary 1975 permits the establishment of specialised courts by Royal Decree on the recommendation of the Supreme Judicial Council. The Commercial Court (al-Mahkamah al-Tijariyyah) and the Mazalim are not required to decide in accordance with shariah; their procedure is simple and their composition of judges (mostly lawyers with modern backgrounds) ensures greater flexibility in the conduct of cases.

The competence of the Saudi courts system is expounded by the Law of the Judiciary 1975. Shariah courts have jurisdiction over all disputes and crimes except those excluded from their jurisdiction by law. Shariah courts hear cases related to personal status, family and civil disputes, and most criminal cases. However, statutory laws and regulations have granted jurisdiction over different claims and crimes to either the Board of Grievances or administrative committees. Cases involving claims against the government and the enforcement of foreign judgments are heard by specialised tribunals and the Board of Grievances.[3]

The Law of the Judiciary 1975 (LJ) organises the Courts System in the following descending order:

- Supreme Judicial Council;
- Courts of Appeal; and,
- First-Instance Courts (General Courts and Summary Courts).

Article 5 of the LJ identifies the Supreme Judicial Council (SJC) as the highest judicial authority in the current system. It is composed of eleven members. Five full-time members constitute the Permanent Panel of the Council.

The SJC plays a key role in establishing general principles and procedures that lower courts are bound to follow. The Council also looks into shariah questions that require a statement of general shariah principles when these questions are referred to the Council by the Minister of Justice.

A three-judge panel always renders the Court of Appeal's judgment. However, for cases that involve capital punishments of death and amputations, a five-judge panel renders the decision.

Cases involving abduction or burglary and death sentences are automatically considered by the Court of Appeal. The latter does not reverse lower court decisions. Instead, it either affirms them or sends them back to the lower trial judge(s) for modification. If the latter maintained its judgement, the Court of Appeal can overrule the original decision and have another judge or panel of the lower court review the case.

There are two types of first-instance courts: Summary Courts and General Courts. The composition and jurisdiction of the Summary Courts are determined by the Minister of Justice on the recommendation of the SJC. A single judge hands down the judgments. Summary Courts have jurisdiction over certain *ḥudūd* offences, *taʿzīr* cases, and fines up to 20,000 Saudi Riyals. They also have jurisdiction over civil claims for sums less than 8,000 Saudi Riyals.

The General Courts are presided over by one or more judges. Composition and jurisdiction of these courts are also determined by the Minister of Justice on the recommendations of the SJC. General Courts have jurisdiction over crimes that carry the death penalty and *qiṣāṣ* in bodily injuries and also civil claims of up to 20,000 Saudi Riyals. A single judge renders judgments in a General Court, except in death punishments or retaliation, which require a three-judge panel.

Saudi judges mete out the death penalty even for *taʿzīr* offenses, a position that is upheld in classical Ḥanbalī and, in some cases, Mālikī jurisprudence. General Courts are not empowered, however, to issue a death sentence by *taʿzīr* , unless a unanimous vote has been reached by the panel of judges. *Taʿzīr* represents the bulk of General Court decisions, many of which are issued under national regulations and include bribery, traffic violations, and drug abuse. The most common punishment for a *taʿzīr* offence is flogging.

There are more than twenty-two General Courts in Saudi Arabia. There are also two courts for the Shii minority of the Jaʿfarī school in the Eastern Province dealing with family, civil, and religious disputes. Appellate courts sit in Mecca and Riyadh and review decisions for compliance with shariah.

A conviction requires proof in one of three ways. The first is an uncoerced confession. Alternatively, the testimony of two male witnesses can convict (four in the case of adultery), unless it concerns a *ḥudūd* crime, in which case a confession is also required. Women's evidence normally

carries half the weight of men in shariah courts. However, in criminal trials women's testimony is generally not admitted. Testimony from non-Muslims or Muslims whose doctrines are considered unacceptable may come under scrutiny and are discounted. A solemn oath or a denial to take it can be also used as evidence. Oath taking is taken particularly seriously in a religious society such as Saudi Arabia, and refusal to take an oath will be taken as an admission of guilt that could result in conviction.

As in the classical view, which differentiates the evidential standards of *ḥudūd* from other crimes, the standard of proof in *taʿzīr* offences is usually lower than the standard of proof required in *ḥudūd* offences. For example, if a person retracts his or her confession during the trial, alleging coercion, punishment is suspended. If additional circumstantial evidence exists, the person may be tried under *taʿzīr*. However, circumstantial evidence is not admitted in *ḥudūd* or retaliation offences.[4]

In 2009, the king made a number of significant changes to the judiciary's personnel at the most senior level by bringing in a younger generation. This included a new Minister of Justice and a new chairman of the SJC. The outgoing chairman was known to oppose the codification of shariah. The king also appointed a new head of the Board of Grievances, and Abdulrahman b. Abdulaziz al-Kelya was appointed as the first Chief Justice of the new Supreme Court. As of a January 2013 Royal Decree, the SJC will be headed by the Minister of Justice. The Chief Justice of the Supreme Court will also be a member.

Statutory law in KSA is often known as *niẓām* (regulations), which is subordinate to shariah and in theory may not conflict with it. Saudi Arabian judges adjudicate on the basis of the Ḥanbalī interpretations of shariah in *ḥudūd* and *qiṣāṣ* crimes as well as in *taʿzīr* offenses. They cross-reference the opinions found in the works of renowned scholars, and on occasion in unprecedented cases, through novel interpretation of the sources and *ijtihād*. Saudi judges enjoy a degree of independence from the king, in line with the shariah principle of impartiality of justice, understood to mean that the state should not interfere in the judicial process.[5] Traditional areas of law continue to be governed by shariah while certain other areas relating to corporation, tax, oil and gas, immigration, and so forth have been regulated under Royal Decrees and Nizam.

The application of Islamic criminal law in KSA is often said to be a success story. Thus it is noted that, in the early years of the establishment of the Saudi Kingdom under King ʿAbd al-Azīz b. Saʿūd, the country suffered from rampant crime and insecurity, especially in view of the vast numbers

of hajj pilgrims that came to the country from all places. After the introduction of Islamic criminal law and its regular enforcement, crime rates fell consistently, so much so that Saudi Arabia became one of the world's safest countries.[6]

Ḥudūd sentences are pronounced infrequently. For example, in 1982–1983, there were 4,925 *taʿzīr* convictions for theft but only two amputations for theft. All *ḥudūd* offences are first tried in courts consisting of three judges, and the king reviews death judgments before any execution takes place. Stoning to death and amputation are relatively rare: between 1981 and 1992, there were forty-five judicial amputations and four death sentences by stoning.[7]

Death punishment for capital offences is carried out in Saudi Arabia through decapitation or beheading. Other countries that use beheading include Yemen, Iran, and Qatar. In 2007 there were a total of 151 beheadings in Saudi Arabia, exceeding the previous record of 113 in 2000.[8] According to Amnesty International reports, there were approximately 26 beheading cases in 2011, which is the year of the Arab Spring, and 90 cases in 2014. However, the number of cases rapidly increased in 2015. In the first half of 2015, the Saudi government beheaded more than 100 people, most of them foreign nationals.[9]

Amnesty International says that in 2015 the kingdom carried out at least 158 death sentences, making it the third most prolific executioner after Iran and Pakistan. As of mid-October 2016, according to an Agence France Presse (AFP) tally of ministry statements, the number of locals or foreigners put to death in Saudi Arabia had reached 134.[10] The last of this execution was reported to be that of a member of Saudi royalty, Prince Turkī b. Saʿūd al-Kabīr, who was put to death in Riyadh for shooting to death Adel al-Mahemid, a Saudi, during a brawl, the interior ministry said in a statement. *Arab News* quoted the victim's uncle, Abdul Rahman al-Falaj, as saying that the sentence reflected the kingdom's "fair judicial system."[11] Beheadings are normally carried out in major cities on Fridays, after prayers, in the vicinity or in front of mosques.[12]

In recent years, there have been a number of robbery and theft cases. On 29 March 2011, Riyadh's General Court sentenced Amir 'Iyada and five other defendants to have their right hands and left legs amputated for committing armed (highway) robbery or *ḥirābah*. The court found that on the morning of 9 October 2010, the defendants cornered three employees of the Tamimi supermarket on Riyadh's King Fahd Road as they were transporting the week's proceeds of SAR 4 million (about USD$1.07 million) in

the boot of their car. They threatened the employees with a gun and took the money from them. No one was physically harmed. The court of appeal was said to have upheld the verdict in October of that year.[13] In a separate case of theft, the hand of Amr Nasr, an Egyptian man, was amputated in 2007. In December 2011, the right hand of a Nigerian man, Abdulsamad Ismail Abdullah Hawsawe, was amputated after he was found guilty of stealing gold, a pistol, and a mobile phone.

An informed observer commented that "punishments in Saudi Arabia are now generally much less draconian. Since the Middle Ages, when these doctrines were formulated, the trend has been towards more lenient punishments."[14] He further added that "the doctrines formulated by Muslim jurists in the Middle Ages made it very difficult to convict, either because they defined the crimes extremely narrowly or because the requirement for evidence was extremely high. . . .It wouldn't be sensible to go around maiming the population. There was a realistic view of the punishments, and the jurists were generally humane. The jurisprudence is generally favourable to the defendant."[15]

XXVII

Shariah Punishments in the Islamic Republic of Afghanistan

HISTORICALLY AFGHANISTAN, A landlocked country with a population of about 30 million, has applied shariah as the general law of the land and the country has subscribed to the Ḥanafī school of jurisprudence. Shariah courts were courts of general jurisdiction that were adjudicated mainly on the basis of Ḥanafī law manuals that were mostly available in Arabic. The country is also mostly tribal; reports indicate that an estimated 80 percent of disputes are determined under tribal customary rules and the jirga council methods. Tribalism and its internal authority structures tend to be inherently opposed to the rule of law and concentration of power in a centralised government and, by the same token, also opposed to constitutionalism and the institutionalisation of power in outside bodies. Tribal customary laws are often applied side by side with shariah, mostly by tribal jirga decisions. The Pashtuns, who are the largest of the five major ethnic groups of Afghanistan (the other four being Tajik, Hazarah, Uzbek, and Turkmen), are the main bastion of tribalism in the country. Their traditional code of conduct, known as Pashtunwali, sets the standards of acceptable behaviour both within and between the tribes and continues to dominate social relations as well as matrimonial disputes, property and water disputes, and crimes. The institution of the jirga tribal council ensures the observance of Pashtunwali and functions as an informal tribunal for dispute settlement. Customary rules, such as Badal (revenge) and Beramtah (seizure of the opponent's property in pursuit of a claim), impede the enforcement of state laws and are entrenched enough to take priority even over shariah. Tribal customary laws usually do not apply *ḥudūd* due presumably to their stricter evidential standards.[1]

The fact that about 80 percent of disputes in Afghanistan are handled by local jirgas (in some places called *shūrā*) is due mainly to the lack of popular trust in the regular judiciary, which is infested with widespread corruption. It is also known that official corruption reached unprecedented levels during the Karzai period (2001–2014) and ever since. Lack of effective government, insecurity, and terrorism tend to strengthen tribalism, most noticeably since the American military invasion of October 2001. President Ghani has made several attempts to curb official corruption, mostly under international pressure from aid donors and also based on his own earnestness, but the results are limited due to the daunting size of the problem and the fact that the country's vitality and resources are constantly consumed by the ongoing war with the Taliban and the spread of the ISIS insurgency in recent years. This is not helped by internal disunity and Ghani's differences of opinion with his chief executive Dr. Abdullah.

Jirgas are convened on a case-by-case basis to decide on specific disputes, usually meeting in an open space or local mosque. They hear the disputing parties and then discuss the matter and reach a decision. There is no appeal mechanism, but the disputing parties may take the case to the regular judiciary if they are dissatisfied with the jirga resolution. Jirgas are traditionally male-dominated and may or may not include local religious leaders, but they do usually include representatives, often family members, of both disputing parties. Jirga practices are, however, vehemently opposed by Afghan women activists, the Afghan Independent Human Rights Commission, and the regular judiciary for reasons that they condone violence against women and privilege the rights of male parties and those with power and influence.[2]

Ḥudūd punishments were traditionally applied in the courts of justice and that is still, at least theoretically, the case. But the introduction of formal laws and constitutions tended to introduce uncertainties over the application of *ḥudūd* due partly to the prevalence of statutory laws that are often taken from Egyptian sources and French legal tradition via Egypt. The *ḥudūd* punishments were, in any case, not frequently applied in Afghanistan and were usually converted to *taʿzīr* penalties often consisting of imprisonment, especially when an element of doubt was deemed to exist in the proof or other material elements of the offence.

A General Penal Code (*Nizamnama-e 'omumi-e jaza*) and a series of other statutes were introduced under the reformist king Amanullah (1919–1929) between 1919 and 1923, which paved the way for the introduction of

the first constitution in 1923. Known as *Nizamnama-e Tashkilat-e Asasi*, this constitution adopted, for the first time, the modern principle of legality in criminal law by enacting that "no punishment may be imposed on any person except as provided in the General Penal Code, and the Military Penal Code (*Nizamnama-e jaza-e 'askari*)" (Art. 24).

Islamic revivalism, foreign invasion, and civil war, as well as continuing conflict that has engulfed the country ever since the Russian military invasion of 1979, have weakened the authority of the central government, strengthened tribalism, and reasserted adherence to Islam in the laws and constitutions of Afghanistan. The 2004 constitution thus declared the country as an Islamic Republic for the first time and also provided that "in Afghanistan no law may be contrary to the beliefs and provisions of the sacred religion of Islam" (Art. 3). Article 130 provides further: when adjudicating cases before them, the courts shall apply the constitution and other laws. But when no provision exists in these sources, the courts shall apply the principles of "the Ḥanafī school of law, within the limits set in the constitution and render a decision that secures justice in the best possible way." Ḥanafī jurisprudence is often used in the courts of justice side by side with statutory laws and often provides ready recourse for judges in the event of ambiguity or a gap in the applied statutes. Yet Article 130 also subjects Ḥanafī law to the application of the principle of legality.

The Penal Code (*qanun-e jaza* 1355) 1976 (in 523 Articles) does not legislate on *ḥudūd*, due presumably to the sensitivity of the subject and the pro-status quo attitude of government of then President Mohammad Daud. Thus it is proclaimed at the very outset that "this law regulates crimes and punishments in the *taʿzīr* category. The perpetrators of crimes of *ḥudūd, qiṣāṣ* [retaliation] and *diya* [blood money] offences are punished in accordance with the provisions of the Ḥanafī jurisprudence of the Shariah of Islam" (Art. 1).[3] Then it is provided in the succeeding two articles that "no act shall be considered a crime unless the law says so" (Art. 2); and "no one may be punished except under a law that has been put into effect prior to the perpetration of such crime" (Art. 3) The succeeding two articles further proclaim that everyone is presumed innocent unless proven guilty; and that no punishment may violate basic human dignity (Arts. 4 and 5).

Chapter eight of the Afghan Penal Code 1976 on adultery (*zinā*) and homosexuality begins, however, with the following provision: "When the crime of *zinā* falls short of fulfilling the prerequisites for implementation of the prescribed punishment [*ḥadd*] of *zinā* due to the presence of

doubt or any other ground, the perpetrator shall be punished in accordance with the provisions of this chapter" (Art. 426). The succeeding article then stipulates "long-term imprisonment" for *zinā* but then goes on to articulate in a seven-itemed list the aggravating circumstances of *zinā* that would invoke more severe punishments. This is when the victim of *zinā* is an underage person; the perpetrator is the teacher or employer of his victim or someone in a position of authority; when the victim is a married woman; when a girl loses her virginity as a result of the act of *zinā*; or when the victim has been afflicted with venereal disease as a result. If the act of *zinā* leads to the death of the victim, the punishment will be life imprisonment or death by execution (Arts. 427–428). All of these will be dealt with under the rubric of *taʿzīr*.

Slanderous accusation (*qadhf*) is defined somewhat more widely in Article 436 in that it is not confined to a false accusation of *zinā* but includes also libel and other attributions that humiliate its victim in the public. As for its punishment, the next article merely provides that "if the [shariah] prerequisites of *qadhf* are not fulfilled due to doubt [*shubha*] or other factors, the perpetrator will be liable to imprisonment that does not exceed two years, or fines between ten thousand and twenty thousand Afghanis, or both (Art. 436).

A similar approach is taken with regard to the prescribed crime of theft. Thus it is provided in the Penal Code: "In the event where the required conditions of the crime of theft are not fulfilled due to the presence of doubt [*shubha*] or other factors that come in the way of enforcement of the *ḥadd* punishment, the thief shall be punished in accordance with the provisions stipulated in this chapter" (Art. 454). The next article provides a short list of aggravating circumstances, which, if present, will make the offender liable to life imprisonment. These are as follows: (1) when theft occurs between sunset and sunrise; (2) when two or more persons collude in committing the theft; (3) when theft is accompanied by firearms carried by one or more of the offenders, be it openly or hidden; when the premises are broken into, forged keys are used, or when military or police uniforms are used; or when any other state authority is falsely represented.

Consumption of alcohol appears in a chapter titled "Use of Narcotics and Intoxicants," and it consists of four articles (349–353) detailing instances of punishable uses of these substances and the punishment provided for them, which ranges between three to six months of imprisonment or fines of 3,000 to 6,000 Afghanis or both. When an intoxicated

person is seen in a public place or recreation ground and has evidently lost his faculty of intellect or annoys or harms others, the offender is liable to a short-term imprisonment that may not be less than three months or to fines between 3,000 to 12,000 Afghanis (Art. 352).

The Penal Code 1976 also contemplates the provisions of the Law of Criminal Procedure (*qānūn-e ijra'āt-jazā'i* 1344/1961) (Art. 11), an extensive piece of legislation of 500 articles that was influenced by Egyptian law and has followed a parallel classification of all crimes under the three classes of *jināyah* (felony), *janḥah* (misdemeanour), and *qabahah* (violations). This classification of crimes is also a *taʿzīr*-based arrangement and tends to override the traditional fiqh classifications. The Penal Code 1976 merely mentions the fiqh classification but in essence upholds the classification of crimes under the Law of Criminal Procedure 1961.

The Penal Code also bypasses the shariah rules on just retaliation (*qiṣāṣ*) and also opts for the application of *taʿzīr* punishments when any of the prerequisites of *qiṣāṣ* are not fulfilled. This is partly because all cases of murder and manslaughter would be subsumed under felonies (*jināyat*) and the structure of punishments that the law has provided for them. The Penal Code makes provisions for murder, manslaughter, and unintentional killing (Arts. 394–407), which are then followed by additional provisions on bodily injuries (Arts. 407–417). Thus it is provided with reference to murder: "If in a case of murder, *qiṣāṣ* cannot be implemented due to the absence of one or more of the required conditions, the perpetrator shall be liable to *taʿzīr* punishments in accordance with the provisions of this chapter" (Art. 394). The succeeding article provides a nine-item list of aggravating circumstances, which, if present, make the act of killing liable to death by execution. Included in these are premeditated murder, killing by the use of explosives or poisoning, killing a police officer or other public service employee during the conduct of duty, when the victim is a blood relative in the ascendant line (father, grandfather, mother, grandmother) of the offender, or when the victim's body has been maimed.

The constitution and other laws of Afghanistan stipulate that judges must rely on statutory codes as a matter of priority. Even though recourse to the provisions of the Ḥanafī fiqh is validated in the same sources for *ḥudūd* and *qiṣāṣ*, the Afghan judges tend to take a ready recourse to the resources of Ḥanafī fiqh generally but perhaps relatively less so in the case of *ḥudūd* and *qiṣāṣ* due mainly to the severity of these punishments. This often means that *ḥudūd* and *qiṣāṣ* are rarely implemented. An exception

of note here may be the offence of blasphemy and apostasy for which the death penalty has been passed in a handful of cases in the last few decades. Yet the offender seems to have in most cases managed to escape and taken asylum in a foreign country. In sum, *ḥudūd* and *qiṣāṣ* remain valid law in Afghanistan, but they are not codified in sufficient detail, and direct recourse to Ḥanafī sources on these laws is also not without uncertainties.

XXVIII

Shariah Punishments in the Islamic Republic of Pakistan

PAKISTAN IS THE second-largest Muslim-majority nation next to Indonesia. Supported by the *Jamaat-e-Islami* of Pakistan, General Zia ul Haq seized power in Pakistan in a 1977 military coup; deposed (and eventually executed) the then elected prime minister, Zulfikar Ali Bhutto; and declared martial law. In February 1979, the year of the Iranian revolution, the general announced a comprehensive Islamisation programme. The constitution was amended to ban banking interest, implement the collection of the religious tax of zakah, and strengthened the Federal Shariat Court of Pakistan. The latter was to determine, inter alia, "whether or not any law or provision of a law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and the Sunna."[1]

Article 203D of the amended Constitution 1973 had specified that the Federal Shariat Court (FSC) must, at the request of a citizen or the government, examine any law and rescind it if there is a finding that the law contravenes any injunction of Islam. General Zia's Islamisation programme also included the implementation of criminal legislation. On 9 February 1979, Zia issued five presidential decrees on *ḥudūd,* known as the Enforcement of Hudood Ordinances.

One of the features of these Hudood Ordinances was to make rape one of the *ḥudūd* offences that was to be subsumed under *zinā* as the ordinances did not distinguish the one from the other. Subsequently there were cases of injustice to victims of rape who became pregnant, but they could not produce the required number of witnesses and thus were convicted themselves for adultery. In 2006 the offence of rape was removed from the Hudood Ordinances and placed under the Penal Code of Pakistan

1860 again. Subsequently it began to be tried by the civil courts and has remained so ever since.

Three amendments were added in 1980, 1982, and 1986, respectively, to the Pakistan Penal Code 1860 criminalising—by words or acts—defiling of the Prophet, his wives, or relatives and desecrating the Qur'an. These amendments made the defiling of the Prophet into the capital offence of apostasy. In 1990, the passing of the Qisas and Diyat Ordinances also brought the Pakistan Penal Code into conformity with shariah on homicide and wounding.[2]

In addition to the *ḥudūd* crimes, the ordinances contain provisions on the application of *taʿzīr* discretionary punishments. These provisions impose punishments for acts that fall under the definition of a *ḥudūd* crime but which can be proven according to the normal rules of evidence and not according to the strict standards of *ḥudūd* offences. *Taʿzīr* was applicable to acts resembling *ḥudūd* but that did not fall under its strict definition.[3] The punishment for such crimes is almost always flogging, sometimes accompanied by imprisonment.

For example, the law concerning illicit sexual intercourse states that if a person accused of adultery/fornication cannot be convicted according to the requirements of shariah (confession or four eye witnesses), the accused can still be punished with a *taʿzīr* punishment of up to ten years of imprisonment and thirty lashes of the whip (Art. 10, Offences of *Zinā* [Enforcement of *Hudood*] Ordinance).[4]

Rape is identified as a separate crime, but the same punishment applies to it as in the case of *zinā*. However, the court can still mete out, in addition to one hundred lashes, any "other punishment, including the sentence of death, as the court may deem fit, having regard to the circumstances of the case" (Art. 6, Offences of *Zina* [Enforcement of *Hudood*] Ordinance).

The punishment for an unfounded accusation of *zinā* contains a novel rule: The punishment for a slanderous accusation "lapses" if the accusation is made "in the public interest" or by a person who has authority over the accused (Art. 3, Offences of *Qazf* [Enforcement of *Hudood*] Ordinance, 1979). This means that an accusation of sexual misconduct may be reported by the father or husband of a woman accused in this way without any fear on the part of the accuser of being punished for slander. Under this rule, the accuser will not be punished if he or she made the accusation "in the public interest."[5]

The FSC ruled in the case of Hazoor Bakhsh vs. Federation of Pakistan PLD (1981), FSC 145, by a majority of four to one that the provision of *rajam* (stoning), as had been stipulated in sections five and six of the Offence of *Zina* of the 1979 Ordinance, was repugnant to Islam. In a departure from the classical doctrine, the court mentioned that the Qur'an only specifies 100 lashes as punishment for *zinā*. The court found that the Qur'an prescribes 100 lashes for both the man and the woman when found guilty of *zinā*. The court also examined some hadiths and found that the stoning was not mandatory but only discretionary (*taʿzīr*). The court did not raise the question on what grounds a judge could mete out a greater penalty (death by stoning) under *taʿzīr*, which will supersede the prescribed Qur'anic 100 lashes for the offence of *zinā*.[6] General Zia did not like this decision, and as a consequence he had the court judges replaced by other judges. He also amended the constitution to enable the court to hear the case again. The newly reconstituted court ruled in Federation of Pakistan vs. Hazoor Bakhsh[7] that stoning to death is not repugnant to Islam. It was also stated that no legislature is authorised to change this punishment because there is nothing therein contrary to the Qur'an or Sunnah. Thus, the judgment of 21 March 1981 was withdrawn.[8] Nevertheless, this punishment has not been officially carried out in recent decades. In a similar vein, notwithstanding the new composition of the FSC, convictions for *ḥudūd* offenses appear to be rare.[9]

Before 1998, lower courts would routinely convict women of illicit sexual intercourse on the evidence of a mere accusation by their husbands, and then they would mete out punishment on the basis of *taʿzīr*. In 1998, however, the Supreme Court ruled that the imprecation, or *līʿān,* procedure (Art. 14, Offences of *Qazf* [Enforcement of *Hudood*] Ordinance, 1979) must be followed. This meant that if a husband wished to accuse his wife of adultery, he would have to take a solemn oath to that effect four times, with a fifth oath calling the curse of God on himself if she was telling the truth. The wife could avert punishment by taking four solemn oaths and say in rebuttal that she did not commit adultery, with a fifth oath calling the curse of God on herself if the husband was telling the truth. After this, the marriage is dissolved and both go unpunished.[10]

Following the international publicity of the gang rape of Mukhtaran Mai in 2002, the then president of Pakistan, General Parviz Musharraf, called for "possible amendments to the *Hudood* Ordinances 1979 that might include amending the requirement for a rape victim to produce

'four pious male witnesses' to support her accusation." It was further proposed that sex with a girl under the age of sixteen, with or without her consent, should be declared as rape. Provisions were also envisaged to cover cases such as kidnapping and "forced elopement"—neither of which were adequately addressed under the *ḥudūd* laws. Trafficking of women for prostitution and gang rape were also not covered. It was further suggested that the death penalty should be imposed for proven cases of gang rape.[11]

In November 2005, the National Commission on the Status of Women (NCSW) recommended that the *zinā ḥudūd* laws are altogether flawed and needed to be thoroughly revised in order to make them nondiscriminatory and fair. The NCSW also stated that "currently, the recommendations are under review by the government and legal experts."[12]

In August 2006, Shaheen Sardar Ali presented a paper at the International Judicial Conference on *Hudood* Laws. She wrote that, in response to the consistent challenge, the Government of Pakistan was considering an amendment to the *Hudood* Ordinances comprising both substantive and procedural modifications. She then added: "Since no official draft has been circulated to date," it was not possible to discuss it only from sketchy excerpts appearing in the newspapers.[13]

In another report on the status of *ḥudūd* laws in Pakistan, Zahirjan Mohamed wrote that the Protection of Women (Criminal Laws Amendment) Act (PWA), 2006, also informally known as the Women's Protection Bill, was passed by the National Assembly and the Senate in November 2006, and the president assented to it on 1 December 2006. This act introduced a number of significant amendments (elaborated in the following section) to the *ḥudūd* laws and other criminal statutes.[14]

In December 2010, the FSC, declared that it had exclusive jurisdiction over all matters relating to *hudood*, including *zinā*, which it defined as "adultery, fornication and rape," and *qazaf* (imputation of *zinā*). The declaration asserts that four sections of the PWA dealing with adultery and slander are unconstitutional because they contravene the *Hudood* Ordinances, and it ordered the federal government to repeal those sections by 22 June 2011. Shirkat Gah, a Pakistani women's rights organisation, stated that the judgement was an attempt by the FSC to "expand its jurisdiction and oust the jurisdiction of the superior courts" and to "undermine the legislative powers of the parliament" (Shirkat Gah, 29 December 2010).

Several sources indicated that the implementation of the PWA had reduced the number of women accused of or charged with adultery. Another study on the effect of the PWA similarly reported that a "radical drop in

charges of *zinā* against women" was observed among all survey respondents, which included session judges, police officials, prison authorities, and lawyers. A decrease in the number of female prisoners was also noted. It was further stated that more women had been reporting rape to the police.[15]

The *ḥudūd* narrative in Pakistan thus remained unfinished. The various initiatives taken by different agencies, regimes, and political leaders, not all of them consistently or in tune with one another, have brought about a mixed picture of developments concerning Islamic criminal law, especially *ḥudūd*. A degree of variance is also observed in the roles respectively of the two juridical authorities of the land—the Supreme Court of Pakistan, which is the epic court, and the FSC, also possessing exclusive jurisdiction in shariah matters—and that they sometimes issued divergent rulings.

There were other cases where tribal courts (Panchayat) issued judgements and implemented the *ḥudūd* punishments, even though it had no legal basis for such rulings. One example is the case of Arifa Bibi, a young mother of two, who was sentenced to death by stoning by a Pakistani tribal court and was executed on 11 July 2013 at the hands of her family. Her uncle, cousins, and other family members threw stones at the woman until she died, all because, as reports indicated, she had a mobile phone and was accused of committing adultery. Since the stoning of Arifa Bibi, women's rights groups have launched an even stronger campaign to put a ban on stoning.[16] Further developments of a more decisive nature would seem to be in order to clarify the remaining unresolved issues of concern to Islamic criminal law and *ḥudūd* punishments in Pakistan.

XXIX

Shariah Punishments in the Islamic Republic of Iran

IN MARCH 1975 the shah of Iran, Mohammed Reza Pahlavi, dissolved all political parties and announced the formation of a one-party state under the newly formed Iran People's Resurgence Party. He required all Iranians to become members of this party. The shah had ruled Iran with an iron fist and was seen as a close ally of the West and a supporter of Western ways of life and culture. Ayatollah Khomeini was in the meantime conducting his antiregime activities from abroad. The Iranian Islamic Revolution of February 1979 put an end to the shah's regime and introduced a new constitution in the same year. Article 1 of the Islamic Republic of Iran (IRI) Constitution 1979, which has undergone several amendments since, stated that "the form of government of Iran is that of an Islamic Republic." Article 4 provides that all civil, penal, financial, economic, administrative, cultural, military, political, and any other laws must be based on Islamic criteria. Article 12 provides that the official state religion is Islam and the Twelver Jaʿfarī school; other schools of law are to be accorded full respect and freedom of religious practice, including matters of personal status.

Revolutionary courts were established after the Islamic revolution, and a law was introduced in June 1979 to declare these courts to be competent to adjudicate cases of oppression and homicide committed in support of the Pahlavi regime.

As time went by, the courts expanded their jurisdiction. After the 1979 revolution and as early as 1981 they began to try sexual offenses and impose *ḥudūd* punishments, including amputations and stoning to death. Frequently the charge on which the accused persons were convicted was based on sura 5, verse 33 of the Qur'an: "waging war against God and His

Messenger" and "spreading corruption in the earth," for which the courts imposed amputation or the death penalty.[1]

In 1982 and 1983, four laws were introduced: (1) The Law Concerning *Ḥudūd* and *Qisas* and Other Relevant Provisions, (2) The Law Concerning *Diyat*, (3) The Law Concerning Islamic Punishments, and (4) The Law Concerning Provisions on *Taʿzīr*. All of these were later replaced and incorporated initially into the Penal Code 1991, subsequently revised in 1996, and finally passed into a new Islamic Penal Code (IPC) containing 428 articles, which was, in turn, ratified by the Council of Guardians in January 2012.[2] It was subsequently sent to the president for his signature as required by article 123 of the constitution. However, the Guardian Council recalled it in October 2012 before it received the president's signature on the basis of "incompatibility with shariah in 52 cases."[3] The code was last amended by Parliament in February 2013 and was approved for the second time by the Guardian Council. The president signed the code, and it came into force in June 2013.[4]

A certain commitment to the rule of law was shown in article 289 of the Code of Criminal Procedure, which stipulated that sentences in criminal cases must identify the specific article on which a conviction is based. Yet the initial rigour of this ruling was diluted by a subsequent provision to the effect that, in cases where no specific legal provision existed, the court was obliged to apply shariah. It is on this basis that the death sentence for apostasy can be imposed. However, in cases of doubt, *ḥudūd* penalties were to be suspended.[5]

The IPC 2013 provides that "the *ḥadd* punishment for *zinā* committed by an unmarried person (*zinā-ye gheyre-mohsaneh*) is one hundred lashes." But when it comes to adultery of a married man or woman (*zinā-ye mohsaneh*), the code is silent and makes no provision in this regard.[6] Article 36 of the constitution and article 2 of the IPC 2013 only consider acts to be crimes if the law provides a punishment. Therefore, stoning to death for adultery is no longer legally prescribed.[7] Yet according to Amnesty International reports in 2014 and 2015, at least one stoning-to-death sentence was reported in Ghaemshahr, Mazandaran province, but no execution is reported to have been carried out.[8]

The international media in December 2002 reported that Iran's judiciary had suspended the enforcement of death by stoning. Jamileh Kadivar, an MP, reportedly said that "the head of the judiciary has sent a ruling to judges telling them not to order stoning." She added that the decision would be upheld pending a permanent change in the law.[9] Kadivar also

stated that execution by stoning for adultery could be imposed but that such verdicts were seldom issued in practice. The alternative punishments were expected to be most likely imprisonment.

The offence of "armed disturbance of the peace (*muharābah*)" has been broadly defined so as to include acts of a political nature, such as supporting rebellion (Art. 198, IPC 2013) and making preparations to overthrow the Islamic regime (Art. 199). These offences were punishable by death, crucifixion, or alternate amputations.[10]

According to article 260 of the IPC 2013, any person who insults the Prophet of Islam or other Great Prophets shall be considered as one who reviles the Prophet (*sābb al-nabī*) and thus may be punished by death. The note attached to this article extends the same punishment to those insulting the twelve Shii Imams and the daughter of the Prophet Muḥammad (i.e., Fāṭimah, who was married to ʿAlī, the fourth caliph and first Shii Imam). This article has, however, omitted the ambiguous notion of "insulting the sacred values of Islam," a phrase that appeared in article 513 of the old Penal Code, which was open to broad interpretation and possible abuse.

Article 544 of the IPC provides that "the *diyat* [blood money] for murdering a woman is half that of a man." However, and in order to soften the discriminatory component of this article, the IPC, even though insisting on inherent gender inequality, prescribed a new solution in its succeeding article 545, which reads:

> In all the cases of homicide that the victim is not a man, the difference between her *diyat* and the *diyat* of a man shall be paid from the Fund for Compensation of Bodily Harms.[11]

Furthermore, pursuant to article 225 of the IPC, the following sexual offenses are punishable by death:

(a) Adultery with one's consanguine relative, that is, sister, mother, maternal and paternal aunt, maternal and paternal grandparent, niece and nephew or their children;
(b) Adultery with one's stepmother, in which case the adulterer shall receive the death penalty;
(c) Adultery between a non-Muslim man and a Muslim woman, in which case the adulterer shall receive the death penalty;
(d) Forcible rape, in which case the rapist shall be liable to the death penalty.

A commentator (Shadi Sadr) observed, however, that even though there was no reference to *zinā-yi muḥṣaneh* in the IPC 2013 it did not mean that death by stoning was abolished. Indeed, *zinā-yi muḥṣaneh* remains a crime, albeit one for which no punishment is specified. In such instances, judges have the authority under the constitution to exercise discretion in delivering verdicts of death by stoning by referencing shariah sources in the absence of codified laws.

Further clarification is thus needed on the subject of stoning, as silence on this issue can be given different interpretations. The Shii law position on blood money (*diya*) of a woman, as being half that of a man, has received different responses in other schools of Islamic law. The Ḥanafī school and a substantive body of modern opinion, earlier reviewed, both maintain that the inherent value of life is the same regardless of gender. They refer in this connection to the Qur'anic text on the subject of *qiṣāṣ* (just retaliation), especially the phrase "life for life" (*al-nafsu bi'l-nafs*—Q 5:32) without any further qualification. There is no Qur'anic basis for this differentiation, and the evidence in hadith on it is also inconclusive.

Shaykh Muḥammad al-Ghazālī and his commentator, Yūsuf al-Qaraḍāwī, both Ḥanafī scholars, maintain the principle of equality and refute the assumption that a woman's life is cheaper (*arkhās*) than that of a man as a false assumption (*zaʿm kādhib*). A man who kills a woman is executed, and the same punishment applies to a woman who kills a man. Their blood is equal, and this is the standard shariah position. There is no reason therefore for inequality in their *diya*.[12]

XXX

Islamic Criminal Law in Republic of Nigeria

ISLAM CAME TO Northern Nigeria in the seventh century CE through the jihad of Uthman Dan Fodio who was a Fulani clergy from Mali. However, it peacefully spread in south-western Nigeria through the activities of Arab traders from North Africa and Turkish merchants. The spread of Islam in Nigeria is somewhat similar to how it spread in Malaysia and Southeast Asia, where Islam arrived through traders and Sufis. Nigeria gained independence from Great Britain in 1960. A civilian government ruled first but the military took over in 1966. The civil war broke out the following year and lasted until 1970. The nation returned to civilian rule in 1979, but the military ruled again until another civilian government was formed in 1999.

Nigeria is the most populous country in Africa and the seventh-largest in the world. It is an oil-rich state and the world's twenty-first-largest economy. It comprises two regional/religious zones: north and south. Muslims mainly live in the north and Christians in the south. Unlike Sudan, where the non-Muslim south became a separate country in 2011, Nigeria is a federal republic that is governed by the same government and constitution. The legal system of Nigeria is based on English common law, Islamic law, and customary law. The current constitution of 1999 provides for the establishment of an Appeal Court that hears appeals from the Federal High and State High Courts, shariah courts, and Customary Courts of Appeal. The Federal Court of Appeal is to have at least fifteen judges, no less than three of whom will be well versed in Islamic law and no less than three in customary law (Art. 236.1). Jurisdiction of the shariah appeal courts relates mainly to personal law and religious matters.[1] The constitution further provides, however, that "the Government of the

Federation or of a State shall not adopt any religion as the State religion" (Art. 10).[2]

A Criminal Code based on English law was introduced in 1904. The code allowed courts to try and convict people even of acts not identified as crimes in the code as long as such acts were identified as crimes under customary law and shariah. Thus, a person could be convicted of illegal sexual intercourse even though adultery was not identified as a crime in the Criminal Code.

The Criminal Code 1904 was amended in 1933 to ensure that convictions took place on the basis of written law. Yet the amended code continued to be interpreted in ways that enabled the application of shariah, albeit with some restrictions on sentencing, which precluded punishments repugnant to human dignity and natural justice.[3] This meant that the penalty of stoning to death for adultery or of amputation could not be applied.

British residents maintained extensive overall powers in supervising local courts. Punishments that were seen as excessive by the British, such as crucifixion, stoning to death, or amputation, were commuted to imprisonment. Caning and flogging were permitted, subject to approval of the emir or the district officer. Flogging sentences of women were commuted to prison terms or fines.

A new Penal Code was introduced in Northern Nigeria in 1959. Some *ḥudūd* offences remained punishable. These included drinking alcohol (section 403), illegal sexual intercourse (sections 387–388), and defamation. The 1959 Penal Code, administered by Magistrate Courts, also applies to non-Muslims in the north. The south was governed by the Criminal Code Act of 1961. Beginning in 2000, the 1959 Penal Code in Northern Nigeria was supplanted by Shariah Penal Codes. The reintroduction of shariah penalties was driven by popular demand.

Islamic punishments were thus reintroduced in Northern Nigeria from 2000 onwards. In some states existing laws were merely amended. In other states entirely new codes were passed, The state of Zamfara in the Muslim north enacted the nation's first Shariah Penal Code in 2000, and it was followed by Niger State. By 2002 twelve out of thirty-six Nigerian states and one territory had introduced shariah criminal laws and set up courts for the purpose. Each state has its own governor and legislative assembly.

Shariah courts in Nigeria follow the Mālikī rules of evidence, which allow circumstantial evidence for the conviction of certain crimes. For

example, pregnancy of an unmarried woman is considered as sufficient proof to convict a person of adultery, unless the accused could prove that she was raped.

In 2002, two divorced women were convicted of adultery and sentenced to death by stoning. Safiyyatu Hussaini and Amina Lawal were convicted by lower courts for unlawful sexual intercourse because they were pregnant while unmarried. The court of appeal quashed both convictions on technical grounds. Penal law was not yet duly promulgated when the convictions were passed. The appeal court ruled that pregnancy of an unmarried woman is not sufficient to prove that the accused committed illegal sexual intercourse. The reason was that, according to Mālikī doctrine, the maximum period of gestation is five years. Since both the accused were divorcees, they could theoretically have been pregnant from their previous unions.

Several amputations under just retaliation (*qiṣāṣ*) were reported. In one case, Ahmad Tijani was sentenced in Malunfashi, Katsina in 2001 to be blinded in his right eye after he was convicted of blinding another man in an assault. He was convicted on the basis of the testimony of seven witnesses. There were no reports about whether the sentence was actually executed.

In another case, the upper shariah court in Bauchi ordered in 2003 an amputation of the leg from the knee of a man who cut off the leg of his wife after accusing her of overexposing herself to a doctor during a medical examination. The amputation was to take place without the use of anaesthetics or painkillers, as directed by the court. It is not known whether this sentence had been carried out either.

The Nigerian legal system is characterised by a number of oddities. Some provisions in the federal constitution appear to be at odds with other provisions, just as some of its clauses are also at odds with some provisions of the state Shariah Penal Codes.

For example, while Article 10 of the constitution precludes adoption of any state religion, it also permits, in Article 259.1, establishment of shariah courts of appeal "for any state that requires it." Moreover, jurisdiction of the shariah courts may extend as far "as may be conferred upon it by the law of the State."[4] Questions tend to arise as to the feasibility of these combinations.

The federal constitution allows the northern Muslim states to establish shariah courts and enact Shariah Penal Codes. Oddly, however, the constitution does not permit them to pass legislation governing the

rules of evidence. Legislation pertaining to laws of evidence remains a federal matter according to the constitution. In the interest of consistency, a state that enacts and enforces legislation on certain offence types should also be able to determine what constitutes the evidence of that offence. The application of shariah punishments in any state of the federation is also inconsistent with the Nigerian constitution, as the constitution limits the scope of the application of shariah mainly to the Islamic personal law.

Inconsistencies are also apparent between some provisions in the federal constitution and state shariah penal codes. For example, article 36 (12) of the Nigerian constitution states that "a person shall not be convicted of a criminal offence unless that offence is defined and the penalty for it is prescribed in a written law."[5]

Yet all state shariah penal codes (except the Kano penal code) stipulate that even acts not identified as offences in written law, such as apostasy, may still be punishable as long as they are identified as punishable offences in the Qur'an, the Sunnah, or classical fiqh doctrine. Thus, a person can be convicted of apostasy despite the fact that apostasy is not identified as a crime in any written law, including, in particular, the shariah penal codes.

Moreover, article 38 of the Nigerian constitution safeguards the right to change one's religion: "Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance."[6] This might once again seem inconsistent with allowing the states to punish people for apostasy.

Inconsistencies are also encountered in law enforcement matters. The Nigerian police force is under federal jurisdiction and comprises both Muslim and non-Muslim officers. As a result of the laxity—perceived or real—in the enforcement of *ḥudūd* by non-Muslim police officers, Muslim vigilante groups sometimes take the law into their own hands, justifying their activities as a form of *ḥisbah* (the Qur'anic principle, that is, of promotion of good and prevention of evil).

The Federal Court of Nigeria has to this day not ruled on the constitutionality of enactment of the shariah penal codes. There are fears that if the court rules on this issue, and finds the shariah penal codes unconstitutional, the existence of the federation might be placed in jeopardy.

An uneasy coexistence between the constitution and the state shariah penal codes and practices is becoming increasingly evident. The anomalies

within the Nigerian legal system are thus reflective of the dual legal heritage (Islamic and colonial) of Nigeria. The fact that Nigeria is made up of two distinct communities (Muslim and Christian) certainly played a role. While lawmakers attempted to accommodate both of the faith communities, their efforts were met with limited success and compromises were made along the way to accommodate diverging interests.

The challenge remains as to how to harmonise the two systems in a way that can safeguard the interests of each community without infringing on the aspirations and legitimate claims of the others.

XXXI

Shariah Punishments in Republic of Sudan

AS AFRICA'S THIRD-LARGEST country, Sudan includes many religious, ethnic, and socioeconomic groups. Prevailing issues of access to resources, economic opportunity, and power relations against the background of such diversity has unfortunately resulted in some of Africa's longest-running conflicts since the country became independent in 1956. These conflicts have occurred between Muslims and Christians, Arabs and Africans, nomads and farmers, and other groups. The rule of law is but one of many casualties resulting from the permanent presence of conflict (or threat thereof) in the south, west, and eastern regions. The Mālikī school was the predominant madhhab in Sudan although the dominant school is now the Ḥanafī, due mainly to Ottoman and Egyptian influences.[1]

The administration of justice traditionally was regarded by Arabised Sudanese and a number of southern ethnic groups as the most important function of government. In precolonial times supervision of justice was solely in the hands of the ruler. In the north, most cases were tried by an Islamic judge (*qāḍī*) who was trained in one of the Sunni Islamic legal schools. Crimes against the government, however, were heard by the ruler and decided by him with the advice of the Grand Mufti, who served as his legal adviser.

Although the Muslim influence on Sudanese law remained important, the long years of British colonial rule left the country with a legal system derived from a variety of sources. The primary legal influence remained British because of the weight given to British legal precedent and also due to the fact that most of the lawyers and judges were British-trained. After independence, much discussion took place on the need to reform or

abrogate the system inherited from the British. A commission was preparing a revision of the legal system when Gafaar Mohamed el-Nimeiri and the Free Officers' Movement carried out a military coup against the elected civilian government in 1969. The Nimeiri regime dissolved this commission and formed a new one dominated by twelve Egyptian jurists. In the ensuing years, many Egyptian laws and Egyptian civil, commercial, and penal codes became important sources of legislation in Sudan.[2]

Following a 1971 abortive coup attempt against Nimeiri and a negative turn in Sudan-Egypt relations, a committee of Sudanese lawyers was formed to reexamine the Egyptian-based codes. In 1973 the government repealed these codes, returning the country's legal system to its pre-1970 common law basis. The 1973 constitution of Sudan, article 9, proclaims shariah as the principal source of legislation.

A Committee for the Revision of Laws was again established in 1977. Ḥasan al-Turābī (d. 1437/2016), the then leader of the National Islamic Front, was selected as a member of this committee. However, proposals to ban alcohol and banking interests and to implement legal alms (*zakāh*) were shelved, and so were the plans to implement shariah generally. In 1983, Nimeiri announced that the government would introduce Islamic law by means of a presidential decree.[3]

Nimeiri issued several decrees, known as the September Laws, that made shariah the law of the land, with an emphasis on the enforcement of *ḥudūd* punishments, retaliation, and *qiṣāṣ* laws, followed by introduction of the Penal Code 1983.

This code did not, however, explicitly identify all punishable offenses. But it stated in Article 458.3 that if a defendant could not be punished with a fixed punishment due to uncertainty (*shubha*), he could still be punished in any way the court saw fit, even if the offense was not identified as such in the code. Widespread criticism of the code followed, especially based on its departure from many of the classical fiqh positions. Article 3 of the Law Concerning the Bases of Judicial Sentences (*qānūn uṣūl aḥkām al-qaḍāʾiyyah*) 1983 required that, in the absence of applicable rules in the Penal Code, the judge must uphold and apply Islamic law. It was on this basis that Mahmoud Mohammed Taha, a scholar and political opponent of Nimeiri, was convicted of apostasy and executed in 1985 at the age of seventy-six. Taha was sentenced to death even though the 1983 Penal Code did not identify apostasy as a crime.[4]

The 1983 Penal Code broadened the scope of *ḥudūd* punishments to acts that were not designated as *ḥudūd* crimes in classical fiqh. For instance,

the definition of theft became wider than under classical Islamic law. It was no longer a requirement that the theft originated in a secure place or area and was carried out surreptitiously. This meant that the scope for the application of punishment by amputation was greatly expanded.[5]

In a similar vein, Article 457 of the Penal Code made membership in a criminal organisation punishable with the prescribed punishment for armed robbery, *ḥirābah*, which could be carried out in one or more of the following methods: execution, execution with crucifixion, alternate amputation, imprisonment, or banishment.[6] The scope of *taʿzīr* punishments was also expanded.

Thus, if an unmarried couple was seen together in public, they could be charged with the new punishable offence of "attempted unlawful intercourse."[7] The fiqh manuals record *khalwah* (illicit privacy) as an offense, but that is most likely not committed in a public place.

Convictions for *ḥudūd* crimes showed a marked increase as a result of relaxing the rules of evidence (Evidence Act of 1983). If the required two (or, in the case of adultery, four) male witnesses of good character were not available, the accused may still be convicted by the testimony of other witnesses at the discretion of the court (Arts. 77 and 78, Evidence Act 1983).[8]

Amputations also increased greatly. In 1985, 65 judicial amputations were reported to have taken place, including 20 alternate amputations. The total number of amputations between September 1983 and April 1985, when Nimeiri was overthrown, is given as between 96 and 120.[9] After April 1985, the government suspended all amputations and other harsh punishments.

Both the transitional military government of General Siwar Adh-Dhahab and the democratic government of Ṣādiq al-Mahdī expressed support for shariah but criticised its method of implementation under Nimeiri.

In April 1986, the Law Concerning the Bases of Judicial Sentences was amended to the effect that the propagation of a new interpretation of Islam does not amount to apostasy. On 18 November 1986, the Constitutional Court declared that Taha's death sentence, carried out the year before, was unconstitutional. Other Sudanese have been convicted of apostasy in subsequent years but escaped the death penalty for various reasons, including renunciation of their new faith.

In August 1986, a resolution by the National Islamic Front (NIF) demanded that all amputation sentences be carried out, but this resolution was defeated in Parliament. In 1989, the NIF, becoming apprehensive that

its project of restoring shariah law would fail, organised a coup d'état and overthrew the multiparty system. In 1998, Sudan adopted a new constitution, which called for restoration of the multiparty system to which it was so vehemently opposed before.[10]

The military coup of June 1989 by General Omar al-Bashīr occurred only twenty-four hours before Ṣādiq al-Mahdī's government was scheduled to vote on rescinding the September Laws. Although al-Bashīr's government initially retained the official freeze on implementation of those laws, unofficially judges were advised to apply shariah in preference to secular codes. Later he promised to implement Islamic law more strictly.[11] Hasan al-Turabi, who had played an influential role in drafting the September Laws, was enlisted to help prepare new laws based on Islamic principles. In January 1991, al-Bashīr decreed that Islamic law would be applied in courts throughout the north but not in the three southern provinces.

Ḥudūd punishments were once again carried out. Al-Bashīr's government adopted, in the meantime, the Criminal Act 1991 (Law 8/1991),[12] which made provisions for *ḥudūd* punishments and extended their scope to cases of homicide and bodily injuries. Other offences were to be punished by flogging, fines, or imprisonment. The 1991 Act (Art. 126) also included the crime of apostasy, which is punishable by death, unless the accused person repents and returns to Islam.[13]

Among the many weaknesses of the *ḥudūd* legislation in Sudan were the extensive powers given to courts to punish people at their discretion, which was based apparently on the principle of *taʿzīr* even if a given act was not identified as an offence in the statute.

On 1 July 1998 a new constitution was introduced following a referendum the previous month. Article 1 of this constitution states that Islam is the religion of the majority of the population but does not proclaim it to be the state religion. Article 65 identified the sources of law as shariah, consensus of the people, the constitution, and custom.

The courts in Sudan have convicted persons for robbery, apostasy, adultery, and other *ḥudūd* crimes, yet their sentences were frequently reduced or quashed, or charges were dropped altogether, in almost all reported cases. In 2007, Sadia Idriss Fadul and Amouna Abdallah Daldoum were sentenced to death by stoning for adultery in the state of al-Gezira. However, their sentences were quashed on the ground of a lack of legal representation at the trial court. In the same year the criminal court of Nyala in south Darfur sentenced two males aged sixteen, Abdelrahman Zakaria Mohamed and Ahmed Abdullah Suleiman, to death by hanging

for murder, causing injury intentionally, and robbery. In April 2012, Intisar Sharif Abdallah was sentenced to death by stoning for adultery in the city of Omdurman near Khartoum. However, the Sudanese authorities dropped all the charges after receiving thousands of protest letters from Amnesty International and other sources.[14] In another case, Laila Ibrahim Issa Jamool was sentenced to death by stoning for adultery in Hay Alnasir, Khartoum.[15] In May 2014, Mariam Yahia Ibrahim Ishag was sentenced to death and 100 lashes for apostasy and adultery respectively. She was born to a Muslim father and a Christian mother, but she was raised in her mother's faith and married to a Christian man. She was given three days to revert back to Islam. However, she refused and was eventually convicted. On appeal her sentence was quashed due to international protests.[16]

Extensive debate continued about stoning and the attempt to reform all *ḥudūd* laws under al-Bashīr's administration, but to no avail. The congress of the Sudan's People's Liberation Movement proposed an initiative to abolish the stoning punishment on the premise that it was not part of the Qur'an, but the proposal was rejected by government ministers. The dispute over the possession and allocation of natural resources increased in the meantime in the south culminating in its secession in 2011 to become South Sudan.[17]

The Transitional Constitution of the Republic of South Sudan was ratified in July 2011 by the South Sudan Legislative Assembly, coming into force on the independence day of South Sudan on 9 July 2011. The constitution established a presidential system headed by a president who is head of state, head of government, and commander-in-chief of the armed forces.

On 22 February 2015, two months before a controversial election took place, al-Bashīr approved new amendments to the country's criminal laws, tackling three major areas: bribery and counterfeit money, apostasy and insulting religion, sexual harassment and rape.

These amendments invoked negative responses from civil society and international quarters. The case of Mariam Yahia, as already mentioned, became a big media issue. Campaigns were launched in Sudan and abroad calling for legal reform, specifically the abolishment of Article 126 of the Criminal Act 1991. This article was amended, yet the amended version of both this (on apostasy) and Article 125 (on insulting religions) is more punitive. The new law redefined apostasy to include anyone who questions the credibility of the Qur'an, the wives of the Prophet, the four caliphs, or other Companions of the Prophet. Moreover, even apostates who "repent"

can face up to five years of imprisonment. The punishment for insulting religions was increased from six months to five years of imprisonment.[18]

With regard to rape and sexual harassment, the problematic Article 149, which confused rape and adultery, was amended. Under the earlier version, if a rape victim failed to prove her case she could be punished with 100 lashes for adultery (*zinā*) if she was unmarried, or with death by stoning if she was married. The new amendment expands the definition of rape but separates it from *zinā,* which was seen as an improvement, yet the new amendments raise doubts with regard to achieving justice for survivors of rape. In an interview, Hikma Yagoub, a human rights lawyer who runs a legal aid organisation in Khartoum, said: "The new definition will give victims and their lawyers the opportunity to achieve justice. However, it's rather meaningless without amending the evidence law of 1994, which is still in line with the old definition of rape." Yagoub and other human rights activists have consequently demanded wider changes in the entire legal system beyond amendment of a few articles in a particular law, calling for "dignity and equality for Sudanese men and women."[19]

In conclusion, the case of Islamic criminal law and *ḥudūd* in Sudan is not untypical of the status of *ḥudūd* issues in other Muslim countries. Unresolved issues remain over important aspects of Islamic criminal law, including *ḥudūd*. The talk of reform to some or all of *ḥudūd* seem to have been initiated on many occasions and under different regimes; however, reaching consensus-based solutions over them and the modalities of their reform have proven difficult to obtain.

XXXII

Shariah Punishments in the Islamic Republics of Mauritania and Maldives, and Islamic State of Yemen

THE ISLAMIC REPUBLIC of Mauritania (IRM) is an Arab country with a population of 3.89 million (2013). Almost 90 percent of IRM is land surface in the African Sahara region. Mauritania proclaimed its independence in 1960 after agreement with France earlier in the same year. It has a mixed legal system of French civil law and shariah. Articles 2 and 5 of the IRM Constitutions of 1961 and 1991, respectively, declared Islam to be "the religion of the people and of the State" but provided that shariah is a compelling source only for the legislators and must be translated into legislation before it is made applicable in courts.[1]

The Mauritanian legal system inherited its French legal and judicial components from its declaration of independence, an influence that is most visible in its civil, commercial, and penal codes.[2] This was affirmed by the 1961 Constitution of IRM, which provides for the continuation of the French laws until it is specifically amended or repealed.[3] However, the continued application of French laws was challenged in the 1980s by the introduction of shariah civil and criminal codes. An Islamic court system was also established beside the existing courts of the Republic. *Ḥudūd* punishments such as flogging, amputation of the hand, and capital punishments became part of applied criminal law, and were implemented in a number of cases. In September 1980, the Islamic courts handed down their first verdict, which resulted in the execution of one man for homicide and the amputation of the hands of three others. Nine people were subsequently whipped in public for stealing. By February

1982, three persons were executed for murder, and dozens of petty thieves either had their hands amputated or were subjected to public flogging.[4]

The Mauritanian Criminal Code (*qanun jinayi*), which was introduced in 1983, identified a number of *ḥudūd* crimes, including adultery, theft, and drinking liquor. In 1984, the code was amended to include the death penalty for apostates. *Ḥudūd* crimes feature in this code as follows:

1. *Apostasy*: Article 306 of the Mauritanian Criminal Code (MCC) deals with apostasy by providing that "any Muslim guilty of the crime of apostasy" is to be given the opportunity to repent within three days. If the accused does not repent within that period, he/she is to be sentenced to death, and the government shall confiscate all of his/her property. The MCC also provides under the same article that if a person who has been sentenced to death for apostasy repents before his/her execution, the Mauritanian Supreme Court can commute his/her death sentence to a jail sentence of between three months and two years plus a fine of 5,000 to 60,000 MRO (360 Mauritanian Ouguiya = 1US$).[5] The only reported case whereby a person was convicted is that of Mohamed Cheikh Ould Mkhaitir in 2012. He was sentenced to death for apostasy for "speaking lightly of the Prophet Mohammed" in an article that was published on his blog. He also challenged some of the Prophet's actions in that article. The only information as of this writing is that the defendant has appealed to the Supreme Court.
2. *Adultery*: Article 307 of the MCC states: any adult Muslim who is guilty of the crime of *zinā* that is proven either through confession or the testimony of four adult witnesses shall be punished by 100 lashes and a year's imprisonment, if the offender is single. For male offenders, the sentence will be carried out where the crime was committed. If the offender is married or divorced, he/she will face the death penalty by public stoning. With regard to pregnant female offenders, the execution of the death penalty will be postponed until after delivery. Article 308 of the code extends the punishment of married persons to those convicted of homosexuality, stating that any adult Muslim man who commits an indecent act or a homosexual act against another will be punished to death by public stoning. Female offenders will be punished for practice of lesbianism by imprisonment between three months and two years and a fine of 5,000 to 60,000 MRO.

3. *Drinking alcohol:* Under Article 341 drinking is liable to eighty lashes of the whip. The offence could be proved through confession, testimony of two witnesses, vomiting, or the smell of alcohol.
4. *Theft*: Article 351 of the MCC penalises theft with amputation of the hand after the fulfillment of all the conditions as provided in this article.

However, these punishments were only applied for a short period after the reforms of the 1980s and have not been enforced since then.

Islamic Republic of Maldives

Maldives is an Islamic republican state, and unlike so many other Muslim countries that have mixed populations, it is almost 100 percent Muslim. It is a follower also of the Shāfiʿī school or madhhab with considerable presence of influential Sufi orders. At the 2006 census, the population of Maldives had reached 298,968 and was projected to reach 317,280 in 2010. Accurate information about its practice of shariah law and *ḥudūd* is scanty. It may be useful to learn, however, that a package of judicial reforms was introduced and passed by the Peoples Majlis (parliament) as early as 1950 following a proposal submitted by the then Minister of Home Affairs and the interim head of the government, Mohamed Amin. Under the authority vested in him by the Majlis, he introduced several changes in the judiciary of Maldives, including the appointment of a separate head of Mahkamatul Sharuiyya (the shariah court). The main functions of this court were divided among several desks, with each desk specialising in specific types of cases.[6] On 25 August 1950 a separate attorney general's office was established for the first time. Until then, its functions were carried out by his desk at the Mahkamatul Sharuiyya. As part of these reforms, a legal profession was formally established. Mohamed Amin devised a set examination for those seeking to become qualified lawyers, and he also commenced implementation "of the *ḥudūd* punishments as prescribed in the Islamic Shariah."[7]

Article 29 of the 1953 Republican Constitution stated that the judicial power of the state is to be vested in the Mahkamatul Sharuiyya (also known as Fandiayaruge), which was to be headed by the chief justice. The latter had a number of Naibs (deputies) whose number was determined by law. The chief justice and his Naibs were to be appointed by the president. On 7 April 1953, two years after the decision was made to implement *ḥudūd* laws, capital punishment was enforced and the first execution was

carried out. On 1 July 1953, sentences passed by the court ordered amputations of the hands of two persons for theft, which were implemented.[8] The Makamtul Sharuiyya were courts of general jurisdiction in the Maldives, and its powers extended to all the *ḥudūd* offences. This was the subject, in fact, of the 1955 regulations that established separate divisions under the supervision of the chief justice and his deputies. These regulations placed all the *ḥudūd* offences, including *zinā, qazf,* "serious offences of theft," murder, homosexuality (*liwāṭ*), and cases of assault and battery involving just retaliation (*qiṣāṣ*) under the division of the chief justice.[9]

Legal and judicial reforms introduced by President Amin came to an abrupt end, however, when he was toppled by a coup led by his vice president on 31 August 1953. It was rumoured that the implementation of *ḥudūd* laws had immensely contributed to Amin's downfall.[10]

In 2008, Maldives adopted a new constitution that proclaims in article 10(a): "The religion of Islam shall be one of the bases of all the laws of the Maldives." Article 10(b) provides that "no law contrary to any of the tenets of Islam can be enacted in the Maldives." Article 2 of the constitution says that the republic "is founded on the principles of Islam." Article 9 says, somewhat surprisingly, that "a non-Muslim may not become a citizen"; article 19 states that "citizens are free to participate in or carry out any activity that is not expressly prohibited by Shariah Islamic law or by the law"; and article 61(b) of the constitution states: "No person may be subjected to any punishment except pursuant to a statute or pursuant to a regulation made under authority of a statute, which has been made available to the public and which defines the criminal offence and the punishment for commission of that offence." Some of these articles clearly stand in disharmony with the Universal Declaration of Human Rights, especially on freedom of religion, even though this constitution clearly adopted the principle of legality in crimes and punishments.[11]

A new penal code was adopted by the Majlis in 2014, which came into effect on 15 July 2015. Consisting of 1,205 sections. This law codifies the whole range of offences and punishments and also clearly subscribes to the principle of legality in criminal law and punishments.[12]

The penal code 2014 has separate sections on "sexual assault offences" (s. 130–135), "unlawful sexual intercourse" (411ff), theft and other property offences, and the like. The law is generally couched in the language and style of a modern statute without articulating an explicit affinity with the terminology or definitions of Islamic criminal law and *ḥudūd*. With regard

to the latter, the penal code has only one section, the very last in fact, which reads as follows:

> Offences for which punishments are prescribed in the Holy Quran: If the offender is found guilty of committing an offence for which punishments are predetermined in the Holy Quran, that person shall be punished according to Islamic Shariah and as prescribed by this Act and the Holy Quran. (Sec. 1205)

Thus it would seem that *ḥudūd* are enforceable under the applied laws of Maldives, including under the penal code, which takes a clear yet sweeping position on the subject. The three sources the code has referred to, namely the Quran, Islamic shariah, and "this act," may not always provide for an easy combination and may well require clarification with reference to particular issues. It has yet to be seen how the courts of Maldives synthesise these and various other sections of the penal code with its article 1205 on *ḥudūd*.

It is worth mentioning perhaps that past practice is indicative of a much lighter approach to *ḥudūd* penalties, as they have been reduced, somewhat like in the Indonesian province of Aceh, and in many states also of Malaysia, to a smaller number of strokes of the whip or the rotan. Applying the punishment of whipping was not severe nor incapacitating in the previous Maldivian practices.

Islamic State of Yemen

The fall of the Soviet Union in 1989, along with the deportation of Yemeni workers from the Kingdom of Saudi Arabia and other Gulf countries after Iraq's invasion of Kuwait in 1990, accelerated the unification of the Yemen Arabic Republic and the People's Democratic Republic of Yemen. The merger of North and South Yemen took place on 22 May 1990. This resulted in the fusion of all institutions of both states, including their distinct legal systems, by declaring the codes of the Yemen Arabic Republic as the official legislation of the new Republic of Yemen.

The nascent republic's leaders used presidential decrees to introduce new laws and regulations that reflected a process of democratisation and economic liberalisation. This was also reflected in the 1990 Constitution of the Republic of Yemen. However, the traditional religious elite resisted these changes, challenged the constitution and other presidential decrees,

and proposed Islamic amendments.[13] The constitution was consequently amended in September 1994 to declare in article 1 that Yemen was an "Arab Islamic State." Article 2 declares Islam to be the official state religion, and Article 3 states that Islamic shariah is "the basis of all laws."

This amendment paved the way for the introduction of a penal code that contained provisions on *ḥudūd* and *taʿzīr* laws. The Law of Crimes and Punishments (12/1994) was introduced as the first penal code in the history of Yemen. Article 11 of this code divided crimes into two types: crimes punished with *ḥudūd* or *qiṣāṣ*; and crimes punished by the judge's discretion (*taʿzīr*). Article 48 provided that only the president of the republic can delay or annul the implementation of these punishments. Further on *ḥudūd*, Article 12 declares that "there are seven crimes for which punishment is prescribed by the religious sources: they are crimes for which a specific religious jurisdictional stipulation exists and is a pure or mixed Right of God, which religious jurisdiction expresses as the limits." The following seven *ḥudūd* crimes are as follows:

1. Mutiny (*baghy*): article 125, Law of Crimes and Punishments 1994 (henceforth LCP) provides that "anyone who undertakes an act with the intention of violating the independence, unity or territorial integrity of the Republic shall be punished by the death penalty." Article 127 further provides that the "death penalty shall be meted out to any of the following: (i) Yemenis who, in any way, enlist with the armed forces of a state that is at war with the Republic; (ii) whoever surrenders any personnel of the armed forces to the enemy, or whoever assists any prisoners to return to the enemy ranks; (iii) whoever supports the enemy with troops, personnel, and funds and whoever acts as a guide to the enemies.
2. Apostasy (*riddah*): Apostasy is subject to the death penalty under article 12 of LCP 1994, which identifies crimes, including apostasy, that are punished according to the provisions of Islamic shariah. Article 259 provides "anyone who turns back from or renounces the religion of Islam, is punished by the death penalty after being questioned for repentance three times and after giving him a respite of thirty days. The apostasy in public by speech or acts is considered a violation of the principles of Islam and its pillars when espoused with intention and determination. If the intention or determination is not established and the guilty shows repentance, there will be no punishment. In November 2012, Ali Qasim Al-Saeedi was arrested by the authorities

and charged with apostasy for posting articles and research on his personal Facebook account that questioned the teachings of the Qur'an. However, it has been reported that Yemen does not enforce the death penalty for apostasy.[14]

3. Banditry and terrorism (*ḥirābah*): Article 306 of LCP provides: "Whoever subjects people to any form of force whatsoever, for any illegal purpose on a public road, desert or structure, at sea or on an airplane; thereby terrorises them and frightens them for their lives or property or honour, whether the victim is an individual or a group and whether by compulsion or by declaration shall be construed and considered as being a *muḥārib* at war." Based on article 307, bandits shall be punished:
   a. By imprisonment up to a maximum of five years if his felony was confined to just threatening on a roadway.
   b. By amputation of the right hand from the wrist and the left foot from the ankle, if he took movable property owned by someone else, whereas his partners who do not take any property shall be punished by imprisonment up to a maximum of ten years.
   c. By execution, as a religiously ordained punishment if such crime leads to killing a human being; any accomplices who do not take part in the killing shall be punished by imprisonment up to a *maximum* of fifteen years.
   d. By execution and crucifixion, if the criminal took property and killed an individual; the accomplices, who do not take part in the theft or the killing, shall be punished by a maximum of up to fifteen years imprisonment.

At least three people were reported to have been sentenced to amputation of limbs. In January 1997 a Court of First Instance in Hadramaut province was reported to have sentenced three men to cross-amputation (of the right hand and left foot) on charges of highway robbery. It was not clear whether these sentences or those passed in previous years were carried out or commuted upon appeal.[15]

4. Theft: Articles 294–304 of Law of Crimes and Punishments 1994 deal with the definition, evidential requirements of proving theft, and its punishment. Article 298 provides that anyone who steals what equals the legal minimum for a theft and complies to the conditions for meting out the religiously ordained punishment shall be punished by amputation of the right hand at the wrist. Repeated theft by the same person, is

punishable with amputation of the left foot at the heel; if the latter again repeats the same crime, imprisonment shall replace amputation for a maximum of up to 15 years. In cases involving more than one thief, the punishment shall be meted out to all of them, regardless of their respective contribution in the theft. In a reported case, Abdulrahman al-Juri, received the cross-amputation sentence for armed robbery on 15th September 2013 at the Sana'a's Specialised Criminal Court. However, due to the paucity of reliable information to the Yemeni judicial process, it remained unverified whether or not the sentence was carried out, due to protest and criticism by Amnesty International.[16]

5. Adultery: Article 263 provides: "Sexual intercourse which is considered adultery is the intercourse that does not involve elements of doubt as from the outset; the adulterer and adulteress without suspicion or coercion are punished with whipping by one hundred strokes as a penalty if not married. It is also lawful for the court to reprimand the perpetrator with imprisonment for a period not exceeding one year. If the adulterer or the adulteress is married, he or she is punished by stoning to death." In December 2002, Layla Radman A'esh was sentenced to execution by stoning and Naji Hizam Abdullah was convicted to flogging after they were found guilty and convicted of adultery by the Court of First Instance in Aden.[17] The defendants appealed the sentence—no further information is made available.
6. Slander: Articles 289–293 of LCP 1994 deal with the slander or defamation of an upright person. "Anyone who defames an upright person by accusing the latter of adultery or refutes the lineage of a person, and fails to prove such claims shall be punished by 80 lashes of the whip as ordained by religious law" (Art. 289).
7. Drinking alcohol: Chapter 5 of LCP deals with gambling, drugs, and alcoholic beverages. Article 283 states that "every adult sane Muslim who drank an alcoholic beverage shall be punished by fifty lashes of the whip in a public area in due fulfillment of religious ordinances, which may be augmented thereafter by imprisonment for a maximum term of one year."

In conclusion, it may be said that the Yemeni law has increased the number of *ḥudūd* crimes to the maximum of seven. The law has turned a blind eye to the growing body of learned opinion on the various aspects of *ḥudūd*, which were discussed in part one of this volume.

XXXIII

Shariah Punishments in Libya, the United Arab Emirates, and Qatar

Libya

Soon after his takeover of power in a military coup in 1969, Muammar Gaddafi banned alcoholic beverages and the giving and taking of banking interest in Libya. A committee was set up in 1971 to prepare for the Islamisation of the Libyan legal system. While the committee was still in deliberation, the Revolutionary Command Council issued a decree identifying shariah as the principal source of all legislation. Legal principles for the purpose of bringing legislation into accord with shariah were to be based on *takhayyur, maṣlaḥah,* and custom. After the revolution, the dual court system was abolished, and civil and shariah courts were merged in 1973. The committee's work resulted in the introduction of four laws, enacted between 1972 and 1974, on *ḥudūd* crimes and other related offences. They dealt with theft and highway robbery (Law 148 of October 1972); illegal sexual intercourse (Law 70, October 1973); unfounded accusation of fornication (Law 52 of October 1974); and lastly on the drinking of alcoholic beverages (Law 89 of November 1974). In 1994 another statute (Law 6 of 1994 consisting of only eight sections) was introduced and ordered the courts to follow the classical rules of retaliation and blood money in homicide cases.[1]

These laws were generally based on the Mālikī school of jurisprudence, which is the prevailing *madhhab* of Libya. The laws so introduced also made provisions based on *taʿzīr* for offences resembling *ḥudūd* crimes, such as punishing minor persons for committing *ḥudūd* offences and offences pertaining to the production and sale of alcoholic beverages that

did not fulfil the fiqh requirements of this offence. In some respects, these laws also adjusted certain aspects of the Mālikī doctrine: first, criminal responsibility begins at age eighteen, not at puberty or fifteen years of age as specified in Mālikī law; and second, a highway robber who has not killed another person nor taken property is to be punished with imprisonment instead of banishment, and one who has both killed and plundered is punished with the death penalty only without public exposure and crucifixion of his body.[2] Third, if a person who has already been punished with amputation and commits another theft offence or banditry, he will not be punished with further amputation. He will suffer a minimum of three years imprisonment until he repents .[3] Fourth, illicit sexual intercourse is only punished with flogging and not by stoning to death, but the court may, in addition, impose imprisonment at its discretion.[4] Whereas until 1998 adultery under the Code of Criminal Procedure could be proven by normal evidence and did not have to fulfill the strict shariah rules of evidence for its proof, in that year the law was amended such that sexual intercourse had, from then onwards, to be proven on the basis of shariah rules or by other scientific methods of proof. Regarding the other *ḥudūd* crimes, the laws also stipulate that the shariah rules of evidence have to be followed.

Furthermore, the new laws were to be applied by the existing courts, and no special tribunals were created for the purpose. In addition, the death penalty and amputation could only be carried out after the case had been reviewed on appeal.[5] Judicial amputations were to be carried out under anaesthesia by a qualified surgeon. There were no reports of amputations for many years even after the introduction of these laws until July 2003, when Amnesty International reported judicial amputations that were carried out on four robbers who were convicted of cross-amputations and were accordingly punished.[6]

United Arab Emirates

Islam is the largest and the official state religion of the United Arab Emirates (UAE), where Muslims constitute 76 percent of its population of 9.4 million. Based on the Ministry of Economy's 2005 census, of the remainder of 76 percent percent were Christian, and 15 percent other (mainly Hindu). Census figures do not take into account the many "temporary" visitors and workers but they also count Baha'is and Druze as Muslim. Among Emirati citizens, 85 percent are Sunni Muslim while 15 percent are

Shia, mostly concentrated in the emirates of Sharjah and Dubai. Omani immigrants are mostly Ibadi. Sufi movements and influences are also active up and down the country.

The government subscribes to a policy of tolerance toward other religions and rarely interferes in the activities of non-Muslims. By the same token, non-Muslims are expected to avoid interfering in Islamic religious matters or the Islamic upbringing of Muslims.

The government has imposed restrictions on proselytising and spreading of other religions among Muslims through any form of media activities and programmes. There are approximately thirty-one churches throughout the country and one each of Hindu, Sikh Gurudwara, and Buddhist temples.

The core principles of the UAE laws are drawn from shariah but, unlike some other jurisdictions that specify a particular school of jurisprudence, the UAE does not mention any one in particular for purposes of legislation. For judicial practice too, the UAE allows the consideration of all schools of law according to the discretion of the presiding judge.[7] Most of the UAE laws are of mixed origins, comprising Islamic and civil laws and usually bearing influences of Egyptian laws.[8] The UAE Constitution 1971 states that "Islam is the official religion of the Union and . . . Islamic Shariah is the main source of its legislation." This last phrase is understood to mean that, in addition to shariah, other sources may also be utilised for purposes of legislation and, it seems, for purposes of court practice as well.

The UAE judiciary consists of three types of courts: civil, criminal, and shariah. The judicial system is derived mainly from the civil law system and shariah. Another line of division is that the UAE has a federal court system, consisting of civil courts and shariah courts. Article 1 of the Federal Penal Code makes the provisions of the Islamic law applicable to the prescribed religious crimes, retaliation, and blood money. The Federal Penal Code has declared as repealed only those provisions of the penal codes of individual emirates that are contradictory to the Federal Penal Code. Otherwise they are enforceable simultaneously.[9]

Shariah courts have exclusive jurisdiction over family law matters and crimes, including adultery, premarital sex, robbery, alcohol consumption, and related crimes. Apostasy is also a crime punishable by death in the UAE (Article 1 and Article 66 of the UAE's Penal Code). Blasphemy is illegal; expatriates involved in insulting Islam are liable to deportation.

Amputation is also a legal punishment in the UAE and shariah courts are empowered to impose it. Flogging is a punishment for criminal offences such as adultery, premarital sex, and alcohol consumption. Flogging sentences issued by shariah courts range from 80 to 200 lashes. Verbal abuse pertaining to a person's honour is punishable by 80 lashes of the whip. Between 2007 and 2014, many people in the UAE were sentenced to 100 lashes. In 2015 an expatriate in Abu Dhabi was sentenced to ten years in prison and 80 lashes after alcohol consumption and raping a toddler. Alcohol consumption for Muslims is illegal and punishable by 80 lashes; many Muslims have been sentenced to 80 lashes of the whip for the offence. Sometimes 40 lashes are also given. Sex outside marriage is punishable by 100 lashes.

In October 2013, a Filipino housemaid was sentenced to 100 lashes for illegitimate pregnancy. Drunk driving is strictly illegal and punishable by 80 lashes.

Stoning is a legal punishment in the UAE for married persons that commit adultery. In May 2014, an Asian housemaid was sentenced to death by stoning in Abu Dhabi. Reports indicate that between 2009 and 2013, several people were sentenced to death by stoning. Yet there are also reports that, in recent years, several people have retracted their guilty plea in illicit sex cases after being sentenced to stoning or 100 lashes. Article 80 of the Abu Dhabi Penal Code makes sodomy punishable with imprisonment of up to fourteen years, while article 177 of the Penal Code of Dubai imposes imprisonment of up to ten years on consensual sodomy.[10]

Qatar

Following Ottoman rule, Qatar became a British protectorate in the early twentieth century until gaining independence in 1971. Qatar has been ruled by the House of Al-Thani since the early nineteenth century. Sheikh Jassim b. Mohammed Al Thani was the founder of the State of Qatar and established a hereditary monarchy. Whether Qatar should be regarded as a constitutional or an absolute monarchy is a matter of opinion. In 2003, the constitution was overwhelmingly approved in a referendum, with almost 98 percent in favour. In 2013, Qatar's total population was 1.8 million: 278,000 Qatari citizens and 1.5 million expatriates.[11]

Qatar's Penal Code (Law No. 11 of 2004) incorporates the shariah *ḥudūd* punishments for various offenses. Article 1 of this law states that

the provisions of Islamic law for the following offenses are applied if the defendant or victim is a Muslim:

1. The *ḥudūd* offenses related to theft, banditry, adultery, defamation, alcohol consumption, and apostasy.
2. Just retaliation (*qiṣāṣ*) offences and blood money (*diya*).

Flogging is used in Qatar as a punishment for alcohol consumption or illicit sexual relations. Article 88 of Qatar's Penal Code 2004 declares the punishment for adultery at 100 lashes. Adultery is punishable by death, however, when a Muslim woman and a non-Muslim man are involved. Muslims are not allowed to consume alcohol in Qatar and if caught consuming alcohol they may be liable to flogging or deportation. Non-Muslim expatriates can obtain a permit to purchase alcohol for personal consumption.[12]

In 2010, at least eighteen people (mostly foreign nationals) were sentenced to floggings of between 40 and 100 lashes for offences related to "illicit sexual relations" or alcohol consumption. In 2011, at least twenty-one people (mostly foreign nationals also) were sentenced to floggings of between 30 and 100 lashes for offences related to illicit sexual relations or alcohol consumption. In 2012, six expatriates were sentenced to floggings of either 40 or 100 lashes. Only Muslims considered medically fit were liable to have such sentences carried out.

While apostasy is subject to the death penalty under Qatar law, Qatar has not imposed any penalty for this offence since its independence in 1971. Blasphemy is punishable by up to seven years, and proselytising can be punished by up to ten years of imprisonment.

XXXIV

Conclusion and Recommendations

THIS BOOK'S REVIEW of developments concerning Islamic criminal laws in Muslim countries is indicative of considerable diversity in the ways in which these laws are understood and implemented. The *ḥudūd* debate in the countries surveyed is also marked by strong currents of opinion both for and against these punishments. This seems to be the case even in countries that do not apply them or apply them selectively, with or without amendments. Muslim opinion is clearly divided on the various aspects of *ḥudūd* laws. Some countries tend to exhibit a certain lack of political will, and there is also a paucity of credible jurisprudential input over Islamic criminal law issues.

Most of the *ḥudūd*-related debates underline the wider question of justice in that a literal application of these punishments, which is usually the case, may actually not secure justice. Then there is the parallel concern as to whether enforcing the *ḥudūd* as an isolated case in an otherwise predominantly secular legal system and state can actually serve its desired purposes. In multireligious societies, including Malaysia, Nigeria, Sudan, and Pakistan, questions are asked over the status of non-Muslims with regard to shariah punishments. Even if the political leaders emphasise in their public statements and speeches that Islamic criminal law will not be applied to non-Muslims, the latter tend to remain circumspect. Their reservations may not be altogether unjustified, as in terms of actual practice, it is difficult to draw clear demarcation lines among citizens based on religion. Suppose a Muslim and a non-Muslim are involved in a case of adultery. It would be difficult to maintain that the two parties will be

treated differently under two separate laws and two separate courts! To do this would likely contravene the constitutional principle of equality before the law, and it would also raise case management problems in two separate court systems.

Our survey has also shown that the Muslim world is internally diverse with varying customary practices and cultural, economic, and political characteristics of their own. Saudi Arabia is evidently different from Indonesia, Iran from Afghanistan and Somalia, and so forth. Whereas some are afflicted with endemic conflict, massive refugee problems, and poverty, others have heterogeneous populations and have to adjust their policies accordingly, not to mention the official corruption that plagues many Muslim societies and jurisdictions. The conservative and modernist strata of populations in Muslim countries tend to differ widely on Islamic criminal law (ICL) issues. The picture is made more complex by the presence or otherwise of non-Muslim minorities, internal dualities in the legal system, legacy issues, and so forth. Thus it is evident that one measure does not fit all and that any reform proposals one may advance should also allow flexibility and contemplate different options. Reform proposals for Malaysia may, for instance, be relevant for Southeast Asian Muslim-majority countries but not for all Muslim countries and cultural zones. Whereas interest in Islam and shariah has generally been on the uptrend, critical voices and negative profiling of shariah have also been getting louder, and even more so, regarding shariah punishments. The proponents of human rights and democracy have also recorded negative views of ICL. Notwithstanding the fact that *ḥudūd* laws have hitherto resisted the prospects of internal reform, a reformist *ijtihād*-oriented approach to some aspects of ICL and *ḥudūd* would seem inevitable.

Some Muslim countries, including Saudi Arabia, Afghanistan, Pakistan, and Iran, have in principle applied and upheld classical doctrines on shariah offences and *ḥudūd*. Others, like the Sudan, have veered from classical fiqh in some respects. Southeast Asian countries, including Malaysia, Brunei, and Aceh Indonesia have yet to embark on the implementation of ICL and *ḥudūd* punishments—and the laws they have either passed or proposed to pass on the introduction of ICL have invoked critical voices within their own countries and populations. There are also countries that have regulated aspects of ICL but that have not been able to consistently enforce them.

Countries and jurisdictions that have not codified shariah punishments, but commit themselves to the application simultaneously of *ḥudūd*

and the constitutional principle of legality in crimes and punishments, place their judges in difficult situations when they adjudicate cases under shariah law. For they would not only be faced with procedural uncertainties but also find themselves in the realm of interpretative jurisprudence rather than clearly written statutes.

It is a cause for concern also to note that *ḥudūd* punishments are sometimes applied by laymen and the mob who take the law unto their own hands and act beyond the pale of due process of law and shariah. One is often shocked by gruesome images of "desert courts" caning of women, and "hanging from trees" of defenceless girls by angry mobs, the Taliban, Daesh and their own relatives in the tribal belts, especially those of Pakistan and Afghanistan. The ardent agents of "honour killing" have also carried out acts in remarkably crude and oppressive ways, and usually only on women, in total disdain for due process and standards of evidence the shariah itself has envisaged for *ḥudūd* punishments.

Another aspect of concern in this discussion relates to the implementation of whipping, even by regular law enforcement agencies. The relevant procedural guidelines and advice of restraint for the actual administration of whipping are often neglected. Proper shariah guidelines would ensure that whipping is neither too severe nor too light. Our investigation shows wide-ranging inconsistency and variation on both sides in the countries and regions of the Middle East, Southeast Asia, and elsewhere.

Our review of substantive ICL in part one has shown that shariah law often provides lenient options and the prospects of selection among diverging interpretations. When that is the case, one ought to be guided by the general guidelines of shariah and the higher purposes of justice, people's benefit, and *maṣlaḥah* without compromising on basic principles. It is instructive in this connection to read in the Qur'an: "So announce the good news to those of My Servants who listen to the word [of God] and follow the best [sense] of it. Those are the ones whom God has guided; and those are the ones endowed with understanding" (al-Zumar, 39:18).

The Prophet Muḥammad also went on record to say in a hadith that "the best part of your religion is that which [offers] easier/lighter [options [*khayru dinikum aysaruhu*]." These aspects of the scriptural guidelines are known and recognised, yet they are often neglected and ignored with respect particularly to *ḥudūd*. Our opinion survey of leading twentieth-century shariah scholars record a resolute call on their part for the postponement of *ḥudūd* punishments, especially of mutilation for theft and of stoning for *zinā*, and their replacement with other suitable alternatives.

Their advice has yet to find a suitable place in Muslim public opinion on ICL and *ḥudūd*.

Following aggressive colonialist suppression of shariah, the twentieth century saw the Islamic revivalist call for the return of shariah and an enlightened *ijtihād*-based approach in its understanding, which has been continuously taking place ever since. Progress has been made as a result not only on reviving parts of shariah but also on introducing legal and constitutional reforms within and outside shariah. Malaysia in the second decade of the twenty-first century is not the same as that of thirty years ago, and this can also be said for many other Muslim-majority countries in Southeast Asia and beyond. There is definitely a greater awareness of making Islam a living reality for more Muslims than was the case in colonial times. This can also be generally said of Muslim minorities in the West. So when leading Muslim scholars offer an opinion and suggest that more time is needed for proper understanding and implementation of shariah punishments, one may see it as a fair assessment rather than an escapist opinion. There has to be, in addition, an effective government to be able not only to ensure an orderly enforcement of *ḥudūd* but also to ensure due process and prevent brutality and lawlessness. It is better to suspend *ḥudūd* rather than to see terrorism and lawlessness proliferating in the name of Islam—such as when so-called desert courts passing summary *ḥudūd* judgments or when a punitive approach to shariah is taken in conflict-ridden countries such as Afghanistan, Somalia, and Iraq. Therefore, one does not see ICL and *ḥudūd* as absolute issues in themselves but instead may recommend gradual steps toward more refined, *ijtihād*-oriented measures for their enforcement.

For Muslim countries that do have an effective government and are able to take a comprehensive approach to the enforcement of *ḥudūd*, wholly or partially, the recommendation is that they should do so in a holistic and compassionate manner as the Qur'an has envisaged, even if it means a departure from some scholastic and conventional positions. They should also place ICL within the larger rubric of government under the rule of law and due process. This may, in turn, require parliamentary approval for ICL or any part thereof to become the applied law of the land. Countries that are not in that position may take a gradual and selective approach and do what they consider to be within their capabilities. Some countries may be able to enforce and reform only certain aspects of ICL, and these actions are in accordance with the Islamic gradualist vision and advice. It is important in every case to obtain the required public support and

parliamentary approval for the new initiative. What follows next are theme-specific conclusions and recommendations regarding the main headings of *ḥudūd*: adultery, theft, banditry/terrorism, slander, and consumption of alcohol. The discussion offers a number of juridical proposals that would hopefully contribute to carefully considered steps toward Islamic criminal law reform.

Pertaining to Zinaā *and Rape*

- The evidence we have reviewed shows that *zinā* under duress is not liable to punishment. Scholastic jurisprudence has recorded this but has fallen short of providing a separate definition and procedure for rape. Judges and muftis have consequently subsumed rape under *zinā*, which has often amounted to blatant miscarriage of justice. A clear and unequivocal separation between *zinā* and rape is therefore necessary. Many Muslim-majority countries have already done so and it is proposed that this becomes the standard position, not only in substantive terms and definitions but also in terms of separate procedures that govern their respective evidential processes and trials. The victim of rape should never be charged with slander in the event of her inability to prove her charge against the rapist, nor should she be asked to prove her innocence. The rape victim should, of course, be free to give evidence, failing which she only reports the matter to the police, and it is for them and the prosecution agencies to bring the criminal to justice.
- As for the punishment of *zinā*, we have examined a cross-section of opinion of the leading twentieth-century ulama and concluded that the maximum punishment of *zinā* is 100 lashes of the whip for married and unmarried persons alike. All claims and prosecutions of *zinā* that fail to present the textually stipulated proof by four eyewitnesses will most likely fall under *taʿzīr*, which would then enable the trial court to order a lesser punishment. The court should take into consideration all relevant factors, including the nature of the relationship, if any, between the parties, use or otherwise of oppressive behaviour, the age factor, indications of repentance and remorse, whether they are a first-time offender or recidivist, their personal reputation, and so forth.
- Pregnancy and confession should both be treated as circumstantial evidence that needs corroboration and endorsement. In the case of confession, it is offered four times and may still be retractable any time prior to the actual enforcement of punishment. If a pregnant woman

also makes a confession, the one will corroborate the other. Yet it is for the court of justice to determine the extent of reliability of that confession.

- A detailed enquiry further reveals that the Prophet, pbuh, most likely applied stoning (*rajm*) for *zinā* as a *taʿzīr* punishment. It has also been found that the existing evidence has fallen short of clarifying the question as to whether stoning was applied before or after the revelation of sura al-Nūr and its stipulated punishment of 100 lashes. The lingering doubt over this would invoke, in turn, the hadith directive that *ḥudūd* should be suspended when there is doubt. Most of the leading twentieth-century shariah scholars have actually taken the view that stoning for *zinā* is no longer an available option, and the present author concurs with that conclusion.
- As for reviving the Qur'anic provisions on repentance and reform, it is proposed that repentance should be made an integral part of the shariah court proceedings in all criminal trials, including *ḥudūd*. This should be mandated by an act of parliament that would hopefully also provide suitable procedural guidelines for verification of the merit of repentance before the court.
- It is patently unjust to single out the female party for punishment in *zinā* prosecutions, especially in the event of pregnancy and cases where the male party has escaped or denied the charges laid against him. The male party to the offence must be present and only then should court proceedings take their due course. Otherwise one is bound to be operating in a doubtful situation.
- On the punishment of homosexuality (*liwāṭ*), the recommendation is to adopt Imam Abū Ḥanīfah's view that *liwāṭ* should be punishable as a *taʿzīr* offence as, unlike *zinā*, there is no mixing of genealogy and family descent in *liwāṭ*. For hardened criminals who openly advocate and practice this offence, and repeat the same after the first conviction, the majority position treats it as a *ḥudūd* crime and subjects it to the same punishment as that of *zinā*.

*Theft (*Sariqah*)*

- With regard to theft, it is proposed to integrate the Qur'anic provisions on repentance and reform and authorise the trial judge to grant a suitable opportunity for it in the trial proceedings. This should also be done through an act of parliament that sets in place clear guidelines, both

substantive and procedural, for judges and law enforcement agencies to ascertain the credibility of repentance.

- It is further proposed, on grounds of perennial doubt (*shubha*) that characterise the liberal capitalist economy and culture, that the capital punishment of mutilation for theft be substituted with alternative modes of punishment. A survey of expert opinion earlier presented on this included that of al-ʿAwā, who observed that "the application of the Islamic penal system under the present circumstances would not lead to the achievement of the ends visualised by this system." Abūl Āʿla Maududi had earlier recorded the view that "enforcing the *ḥadd* of theft would amount to protecting the ill-gotten wealth of the exploiters." Al-Qaraḍāwī found it unacceptable to neglect zakah and the social support system of Islam before enforcing the prescribed punishment of theft. Shaykh Muḥammad al-Ghazālī similarly thought it unacceptable to cut the hand of a petty thief while not applying the same to an embezzler of a stupendous amount of funds from the public treasury. In Muṣṭafā Aḥmad al-Zarqā's assessment, *ḥudūd* may generally be substituted with alternative punishments until such a time when conditions are right for their proper enforcement. And lastly, Shaykh ʿAbd Allāh Bin Bayyah's review of the early Islamic precedent led him to this conclusion: In the event when the Imam/leader is convinced that enforcing *ḥudūd* or *qiṣāṣ* would bring about a greater harm than benefit, he may suspend enforcement.
- Some of the fiqh textbook stipulations concerning theft should also be revised. For instance, theft and robbery from the public treasury, banks, and places where people deposit their assets, as well as embezzlement of large sums by corrupt officials, should not be regarded as mitigating factors on the assumption that the culprit as taxpayer had a share in the stolen assets but should, on the contrary, be regarded as aggravating factors that call for stiffer penalties.

Ḥiraābah, *Banditry, and Terrorism*

- All acts of terror by individuals and groups as well as state terrorism and suicide bombing, along with its organisers and unsuccessful perpetrators; those who destroy people's livelihood through contaminating water, air, and food; and hijackers of airplanes should be subsumed under *ḥirābah*.
- It is further proposed that the shariah concept of *ḥirābah* should apply to human trafficking, ransom-taking, and kidnapping of persons, be

they children or adults and regardless of gender and status. The perpetrators of *ḥirābah* should be liable, upon conviction, to one or more of the prescribed Qur'anic punishments for this crime. Relevant details should be articulated in an act of parliament.

- Terrorism has become exceedingly diversified and multidimensional. It has unfortunately also become a universal scourge that no country or community has the capacity to exterminate altogether or by acting alone. It requires effective international cooperation to address it.
- Terrorism cannot be effectively addressed without identifying its perpetrators and causes. These should be at the forefront of attention in each case and addressed collectively by all the concerned parties. This is an urgent task as terrorism has brutalised and traumatised individuals, communities, and nations, and any neglect in finding effective ways to address it is likely to condone it and lead to its proliferation.
- Violence breeds violence, and despite the claims of some to the contrary, military means have not only failed but increased the scope and scale of terrorism further.
- Among the various scholastic positions on *ḥirābah* reviewed here is a proposal to adopt the one that authorises the head of state and parliament to determine and select from the fourfold Qur'anic punishments for *ḥirābah* that which is deemed to be most suitable and effective.
- In the event where terrorists surrender to the authorities prior to subjugation and arrest, the authorities may grant a pardon absolutely or contingent upon conditions. Judicial proceedings should be involved to determine the credibility of terrorists' repentance.
- Pardon by the authorities does not absolve the culprit of any loss or damage inflicted on the person or property of the victim, whether public or private. The actual property must be returned when it exists, failing which any loss/damage caused should, subject to a court decision, be compensated by the perpetrators or by the state—unless of course the right-bearer decides to waive it.

Consumption of Liquor

- With regard to the punishment for consumption of liquor and other intoxicants, based on a review of the evidence, it is proposed that the lower of the two recorded punishments for this offence should be applied,

that is, the maximum of forty lashes of the whip for cases, including those of drunken driving, that are proven by admissible evidence. This last may involve additional sanctions depending on the severity of violation and its actual consequences.

- The lighter of the two penalties advocated does not, however, extend to drug trafficking, which is a more serious crime and may be determined separately by statutory law that is duly informed by the gravity of the offence and the input, if any, of a judicious policy (*siyāsah*).
- As for the proof of this offence, one may mention the use of breathalyser test as an admissible means of proof even though it is not mentioned in the fiqh manuals. This would actually overcome the much-debated fiqh questions that have been reviewed over the reliability and duration of time of the breath smell and the actual condition of the drunken person. This analysis may also be extended, *mutatis mutandis,* to substance abuse, which may or may not involve the use of a breathalyser but that can be proven by alternative yet reliable scientific tests that establish beyond a doubt the offence in question.
- Our review and examination of the fiqh discourse on the subject also leads us to the conclusion that liquor consumption is not strictly a *ḥudūd* offence in the first place, and the proposed punishment for it also belongs to the category of *taʿzīr*. This would mean, in turn, that penal sanctions for the offence may consist of any number of lashes below the maximum of forty or indeed other alternative sanctions deemed appropriate by the competent authority.
- The open availability of alcohol in many Muslim countries, supermarkets, shops, restaurants, and means of transport by air and land also introduces an element of doubt, which is not helped, in turn, by the prevalence of a secularist culture and environment that should be taken into consideration by the judges and law enforcement authorities.

*Slanderous Accusation (*Qadhf*)*

- Slander (*qadhf*) is one of the *ḥudūd* offences that carries a punishment of eighty lashes upon proof. Our review of the juristic debate on the public and private (Right of God/Right of Man) components of this offence indicates the private claim aspect of *qadhf* to be the more predominant. Thus it would follow that prosecution of this offence should

be made contingent on the request of its victim, and only then should necessary action by law enforcement agencies be taken.

- The victim of slander can also grant a pardon with or without compensation and thus put an end to the dispute. One can imagine the possibility that the victim of slander may want to bring the matter to an early close so as to avoid further publicity. This should be possible for, after all, the Qur'an is supportive of reconciliation (*ṣulḥ*) in disputes, to which *qadhf* should also be open, although the rest of the *ḥudūd* offences are, in theory, not open to pardoning or reconciliation.
- From a perusal of the Qur'anic verse on slander, it is also clear that this offence is closely tied to an unproven charge of *zinā* against a chaste woman. The relevant Qur'anic passage (al-Nūr, 24:2–4) underlines the seriousness of this charge and imposes a supplementary punishment of disqualifying the slanderer from becoming a witness. Slander is thus theme-specific and closely tied to *zinā*; it should not therefore be treated as a generic offence, nor analogically extended to similar offences, such as libel, insult, negative media publicity, and the like, which should be separately regulated and not subsumed under *qadhf*.

*Retaliation and Blood Money (*Qiṣaāṣ and Diya*)*

- The basic objectives of shariah in punishing murder and intentional injury by way of *qiṣāṣ* is realisation of measure-for-measure justice and avoidance of excess in the infliction of punishment. Yet the modalities of realising these objectives and the means or procedures by which they are best achieved may be adjusted in accordance with the prevailing conditions of each society and generation. They may also be duly adjusted in line with the higher purposes, or *maqāṣid*, of shariah and that of a judicious policy (*siyāsah*).
- Just retaliation may be demanded by the attorney general, representing the community, with prior permission of the next of kin of the deceased. It may also be demanded by the victim himself in the case of bodily injuries and approval of public authorities. The next of kin may demand *qiṣāṣ* or grant forgiveness for their part of the claim, or do so in combination with financial compensation (*diya*) to facilitate peaceful

settlement, although forgiveness according to a minority opinion does not combine with compensation.

- *Qiṣāṣ* law that assigns a role to the next of kin is an entrenched aspect of shariah—provided that it is not made into an instrument of abuse—in which case it is for the authorities to ban and prevent abusive practice. Many of the juristic formulations of *qiṣāṣ* and how the balance of the private and public right components thereof are adjusted and maintained are amenable to the rulers' judicious policy and pursuit of the *maqāṣid* of shariah.
- The purpose of *qiṣāṣ* is protection of innocent life and putting an end to vendettas and continued violence. These are the expressed objectives of the law of *qiṣāṣ*, which must remain valid. Yet the society's transition from tribalism to nation-states and then on to the still unfolding borderless world of globalisation would need to be duly reflected in the adjustment of private claim and public claim components of the *qiṣāṣ* law—and in any review/reform thereof.

*Judicious Policy (*Siyaāsah*) and Deterrent Punishment (*Taʿzīr*)*

- As already mentioned, *siyāsah* is a broad principle of Islamic public law of concern to good governance and administration of justice within or outside the sphere of criminal law. In introducing policy initiative and procedural regulation of court affairs, and to some extent also of substantive criminal law, *siyāsah* is the concern mainly of government leaders, the head of state, the judiciary, and parliament.
- *Siyāsah* relates to *ḥudūd* in a regulatory sense of ensuring the best methods of court procedures and case management in the judiciary. It also relates to regulating the role of law enforcement agencies with regard to Islamic criminal law and *ḥudūd*. That said, many of the reformist measures of ICL proposed here would also entail a greater role for *siyāsah* not only in introducing the suggested reforms but also with respect to their orderly implementation and enforcement.
- Early juristic opinion holds that the application of *siyāsah* in the sphere of criminal justice is of concern mainly, or even exclusively, to *taʿzīr*. But to reduce *siyāsah* entirely to *taʿzīr* is less than justified. Be that as it may, both *siyāsah* and *taʿzīr* are now subsumed by the constitutional

principle of legality in that all organs of state, including the head of state, are to comply with the principle of government under the rule of law. Discretionary powers are, in other words, subject to more limitations than before. Whereas the availability of some discretionary powers cannot be overruled altogether, it should nevertheless be defined and regulated in harmony with the guidelines of constitutional law and shariah.

- It is within the realm of *siyāsah* to note that the *ḥudūd* penalties may be frozen under certain conditions when it would cause greater harm than benefit, in which case the rulers' authority comes into the picture. As earlier mentioned, the Prophet, pbuh, suspended *ḥudūd* during warfare for fear of Muslim warriors defecting to the enemy ranks. In the year of famine (*ʿām al-majāʿah*—638–639 CE), the second caliph ʿUmar b. al-Khaṭṭāb exempted people from the payment of *jizyah* and froze the corporal punishment for theft. Muslim jurists have further maintained that there are no capital punishments in the following situations: (a) in non-Muslim territories; (b) in travels during war; (c) when people do not have prior knowledge of the existence of a crime or its rulings; (d) when there is no legitimate ruler; (e) when there are doubts that overwhelm the surrounding circumstances; and (f) when they cause far more damage than actual benefit. In short, shariah punishments and *ḥudūd* are not meant to be tyrannical but to deter crime and secure justice.

As for the conflict of jurisdiction between the civil and shariah courts, which occurs frequently in many Muslim-majority countries with dual court systems, the two courts systems should be combined or else there should be an attempt to establish mixed benches of shariah and civil law judges in order to solve the perennial conflict of jurisdiction between them. This is because justice is essentially monolithic and would differ little whether it is served in civil or shariah courts. To facilitate case management involving Muslim and non-Muslim parties in shariah litigations, there should be mixed benches of shariah and civil law judges sitting together. The discussion in this book has consistently maintained the unitarian character of justice and mentioned that the concept of specification of courts (*takhṣīṣ al-qaḍāʾ*) and setting up of specialised jurisdictions does not interfere with the essentially unitarian conception of justice in shariah. This is also the view of Tun Hamid, the former chief justice of Malaysia, who spoke from experience when he wrote that he had faced problems

since the 1990s and cited cases he had adjudicated in support of his views.[1] Should there be different options over a matter, the ruler, judge, and mufti are advised to opt for the most appropriate yet lighter options that may be available, especially in the imposition of penalties. For as we read in the Qur'an, God Most High desires for us ease, not hardship (al-Baqarah, 2:185), and He does not desire to make religion a burden on people (al-Ḥaj, 22:79). The Prophet has similarly instructed his Companions to facilitate people's affairs, give them good news, and not repel them with doom and gloom (and talk of pain and punishment).[2]

Muslim scholars and judges tend to neglect these instructions and the well-known position that the ultimate goal of shariah is to secure people's welfare, mercy, and justice. This aspect of shariah does not receive due attention within and outside the courts of justice. It is not surprising therefore why shariah is often associated with punitiveness. Punishment in itself has never been a shariah priority and purpose. Yet common perceptions persist that the most intricate and difficult is the most pious—as it takes more effort and self-sacrifice! Legal pedantry thus manages to repress the softer voices of Islam. It then becomes a calling of Muslim religious and political leaders to change this negative profiling through capturing the bigger picture of shariah. This can best be done through affirmative action and the setting of good examples in the true spirit of *iḥsān*.

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A work of this size, with many fresh inroads for that matter, into some of uncharted territories of the shariah, and my inquisitive approach to research, can hardly be free of imperfection. I have not spared any effort to overcome weaknesses, but if there are any remaining, only I am responsible. Should there be any reader/reviewer input, and occasion for me to respond, I remain open to the prospects of further refinement.

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APPENDIX

Syariah Criminal Code (II) Bill 1993 of Kelantan, Malaysia

IT IS HEREBY ENACTED by the Legislature of the State of Kelantan as follows:

PRELIMINARY

1. This Enactment may be cited as the Syariah Criminal Code (II) Enactment 1993 and shall come into force on such date as His Royal Highness the Sultan may by notification in the *Gazette*, appoint.

2. (I) In this Enactment unless the context otherwise requires –

"Court" means the Special Syariah Trial Court and the Special Syariah Court of Appeal established under Part VI of this Enactment;

"diyat" means a sum of money or property payable as a compensation for death or loss of intelligence or injury to any organ which is complete or injury to any organ which is in pairs or the loss of function of any such organ caused to the victim of an offence. A diyat is equivalent to the prevailing price of *4,450* grams of gold or such sum as may be fixed by His Royal Highness the Sultan from time to time in accordance with Syariah Law;

"imprisonment" includes an order restricting an offender to reside within a particular area or district in the State;

"irsy" means a sum of money or property or a part of a diyat payable as compensation for injury (jurh) caused to the victim of an offence as specified in Schedule II, III and IV of this Enactment;

"judge" means a judge appointed under Part VI of this Enactment;

"Jumaah Ulama" means the Jumaah Ulama established under section 12 of the Kelantan Council of Islamic Religion and Malay Custom Enactment 1966;

"mohsan" and "ghairu mohsan" have the same meaning as defined in section 10(2);

"mukallaf" means a person who has attained the age of eighteen years and of sound mind;

"nisab" means a sum of money equivalent to the prevailing price of *4.45* grams of gold; or such sum as may from time to time be fixed by His Royal Highness the Sultan according to Syariah law;

"qisos" means the law of retaliation and equality governing offences of causing death of, and causing bodily injuries to persons;

"son" includes a grandchild and any person in descending order;

"State Service Commission" means the State Service Commission established under Article LXI of the Laws of the Constitution of Kelantan (First Part);

"wali" means a relative of the victim of crime who is entitled to remit the offence committed by an offender on the victim of the offence;

(II) To avoid doubts with regard to identity of the words or expressions used in this Enactment which are listed in Schedule 1, reference may be made to the Arabic Script of the said words and expressions shown against them in the said Schedule.

(III) All words, expressions, definitions and terms used in this Enactment which are not expressly defined in this Enactment shall be deemed to have the meaning given to them in the Interpretation Act 1948 and 1967, if not contrary to Syariah law.

(IV) Save where the context otherwise requires, any reference in this Enactment to a specific Part or section or subsection or Schedule shall be construed as a reference to the specific Part or section or subsection or Schedule in this Enactment.

3. All offences under this Enactment shall be divided into three categories, namely—

(a) offences the punishments of which are ordained by the Holy Quran and the Sunnah. Such offences are referred to as ḥudūd offences and their punishments as ḥudūd punishments;

(b) offences to which qisos applies and such offences also are ordained by the Holy Quran and the Sunnah and are referred to as qisos offences, and their punishments as qisos punishments; and

(c) offences which are neither ḥudūd nor qisos but left to the discretion of the legislature or, according to this Enactment left to the discretion of the Court. Such offences are referred to as ta'zir offences and their punishments as ta'zir punishments:

Provided that where a ḥudūd or a qisos offence cannot be punished with the ḥudūd or qisos punishment respectively because it cannot fulfill the conditions required to attract such punishment, the offence shall become a ta'zir offence and be punished accordingly.

PART I

Ḥudūd Offences

4. Ḥudūd offences are as follows:

   (a) sariqah (theft);
   (b) hirabah
   (c) zina (unlawful carnal intercourse)
   (d) qazaf (accusation of zina which cannot be proved by four witnesses)
   (e) syurb (drinking liquor or intoxicating drink); and
   (f) irtidad or riddah (apostasy)

5. Sariqah consists of an act of removing by stealth a movable property from the custody or possession of its owner without his consent and with the intention to deprive him.

6. Whoever commits sariqah, except in the circumstances enumerated in section 7, shall be punished with ḥudūd punishment as follows:

   (a) for the first offence with amputation of his right hand;
   (b) for the second offence with amputation of part of his left foot; and
   (c) for the third and subsequent offences with imprisonment for such term as in the opinion of the Court, may likely to lead him to repentance.

7. The ḥudūd punishment for sariqah shall not apply in any of the following circumstances:

   (a) where the value of the stolen property is less than the nisab;
   (b) where the offence is not proved by evidences required under the provisions of Part III;
   (c) where the offender is not a mukallaf;
   (d) where the owner of the stolen property has not taken sufficient precaution to guard it against theft, having regards to the nature of the property and place where the property is kept or left;
   (e) where the offender has not obtained full possession of the stolen property, although its owner has already been deprived of its custody and possession;
   (f) where the stolen property is of trifling nature and can be found in abundance in the land or is of perishable nature;
   (g) where the property is of no value according to Syariah law, such as intoxicating drink or instruments used for amusement;
   (h) where the offence is committed by a creditor in respect of the property of his debtor, who refuses to pay the debt:
   Provided that the value of the stolen property shall not exceed the amount of the debt or the value of the stolen property exceeds the amount of the debt but does not exceed the nisab;
   (i) where the offence is committed in circumstances of extreme difficulties, such as war, famine, pestilence and natural disaster;

(j) where the offence is committed within the family, such as a wife stealing from her husband and vice versa or son from his father and vice versa;
(k) where in the case of an offence being committed by a group of persons, the share of each offender after dividing the stolen property or the proceeds thereof is less than the nisab;
(l) where the offender returns the stolen property before the execution of the ḥudūd punishment;
(m) where the owner of the stolen property denies the theft notwithstanding the confession by the offender;
(n) where the offender makes objection accepted by Syariah law against the witnesses; and
(o) where the stolen property is or the circumstances in which the offence is committed are such that according to Syariah law there is no ḥudūd punishment.

8. Hirabah is an act of taking another person's property by force or threat of the use of force done by a person or a group of persons armed with weapon or any instrument capable of being used as weapon.

9. Whoever commits hirabah shall be punished with the "ḥudūd punishments as follows:
(a) death and thereafter crucified, if the victim is killed and his or other person's property is taken away;
(b) death only, if the victim is killed without any property being taken away;
(c) amputation of right hand and left foot; if only the property is taken away without killing the victim or injuring him, but where the property is taken away and bodily injury is caused, diyat or irsy shall be payable in addition to the punishment of amputation of hand and foot; such diyat or irsy being an appropriate amount consistent with the type and nature of injuries caused as specified in Schedules II, III and IV; and
(d) imprisonment for such term as in the opinion of the Court would lead the offender to repentance, if only threats are uttered without any property being taken away or bodily injury caused

10. (1) Zina is an offence which consists of sexual intercourse between a man and a woman who are not married to each other and such intercourse does not come within the meaning of "wati syubhah" as defined in subsection (3).
(2) where an offender is validly married and has experienced sexual intercourse in such marriage, such offender is called "mohsan", but where an offender is not married, or is already married but has not experienced sexual intercourse in such marriage, such offender is called "ghairu mohsan".
(3) Wati syubhah is a sexual intercourse performed by a man with a woman who is not his wife and such intercourse took place
(a) in doubtful circumstances in which he thought that the woman with whom he had sexual intercourse was his wife, when in fact she was not; or
(b) in doubtful circumstances in which he believed his marriage to the woman with whom he had sexual intercourse was valid according to Syariah law, when in fact his marriage to her was invalid.

11. (1) Where the offender who commits the offence of zina is a mohsan, such offender shall be punished with the punishment of rejam, being the punishment of stoning the offender with stones of medium size to death.

    (2) Where the offender who commits the offences of zina is a ghairu mohsan such offender shall be punished with the punishment of whipping of one hundred lashes and in addition thereto to one year imprisonment.

12. (1) Qazaf is an offence of making an accusation of zina, being an accusation incapable of being proved by four witnesses, against a Muslim who is akil baligh and known to be chaste.

    (2) It is also an offence of qazaf for any person to make a statement by expressly saying that a particular individual has committed zina or by impliedly saying that a particular individual is not the parent or not the offspring of another particular individual.

    (3) The statement under subsection (2) shall be deemed to be qazaf unless proved by four male witnesses; and if unproved the person who makes the statement shall be guilty of an offence of qazaf; but where such statement is proved, the person against whom the statement is made shall be guilty of an offence of zina.

    (4) The statement under subsection (2) shall be deemed to be unproved, if one or more of the four witnesses called to give evidence to support the statement decline to testify or do testify but their testimonies are against such statement; and in that event each of the witnesses who give evidence in support of the statement shall be deemed to have committed an offence of qazaf.

13. Whoever commits qazaf shall be punished with eighty lashes of whipping and his testimony shall no longer be accepted until he repents.

14. (1) Al-li'an is an accusation of zina on oath made by a husband against his wife, whilst the wife on oath rejects such accusation; and bothe accusation and rejection are made before a judge by uttering words which according to Syariah law are sufficient to prove al-li'an; and such words shall be as contained in subsection (2).

    (2) The husband who makes the accusation shall repeat four times consecutively the following utterance:

    "Allah is my witness that I speak the truth that my wife . . . . . has committed zina."

    (3) When he has completed repeating those words as contained in subsection (2) four times, he shall make the fifth utterance by saying:

    "The curse of Allah shall fall on me if I have lied."

    (4) To reject the accusation, the wife shall also repeat four times consecutively the following utterance:

    "Allah s my witness that my husband . . . . . had lied in making this accusation against me."

    (5) when she has completed repeating those words as contained in subsection (4) four times, she shall make the fifth utterance by saying:

    "Allah's anger shall fall on me if my husband has spoken the truth."

(6) If the wife has given birth to a child or if she is pregnant both the birth and the pregnancy being considered as the consequence of the zina alleged by the husband, he shall deny fathering the child by adding to the words in subsection (2) which shall be repeated four times, the following utterance:

"The child/what is being carried by my wife is not from me."

15. Where a married couple resorts to al-li'an to settle an accusation of zina between them neither the husband shall be quilty of qazaf, nor the wife of zina, and both shall be free from punishment for such offence; but the marriage shall automatically be dissolved forthwith; and the judge shall make an order accordingly; and the couple shall forever not be capable of marrying each other again; and if they thereafter have sexual intercourse between them such act is zina.

16. Liwat is an offence consisting of carnal intercourse between a male and another male or between a male and a female other than his wife, performed against the order of nature, that is through the anus.

17. Whoever commits liwat shall be punished with the same punishment prescribed for zina.

18. The offence of liwat shall be proved by the same mode as that required to prove zina.

19. (1) Musahaqah is a ta'zir offence consisting of an act of sexual gratification between females by subbing the vagina of one against that of the other and the punishment thereof shall be at the discretion of the Court.

(2) The offence shall be proved by the same mode as that required to prove a ta'zir offence.

20. Ittiyan almaitah is an offence of performing carnal intercourse on a dead body, irrespective of whether such dead body is male or female, and if it is a female dead body whether it is that of the wife of the offender or that of any other person; and whoever commits this offence shall be punished with ta'zir punishment of imprisonment not exceeding five years.

21. Ittiyan albahimah is an offence of performing carnal intercourse with an animal; and whoever commits this offence shall be punishment with ta'zir punishment of imprisonment not exceeding five years.

22. (1) Syurb is an offence of drinking liquor or any other intoxicating drinks and any person who commits this offence, whether intoxicated or not, and irrespective of the quantity consumed, shall be punished with whipping of not more than eighty lashes but not less than forty lashes.

(2) The offence may be proved by oral testimonies of two witnesses or the accused's own confession as provided for in Part III.

23. (1) Irtidad is any act done or any word uttered by a Muslim who is mukallaf, being act or word which according to Syariah law, affects or which is against the 'aqidah (belief) in Islamic religion:

Provided that such act is done or such word is uttered intentionally, voluntarily and knowingly without any compulsion by anyone or by circumstances.

(2) The acts or the words which affect the 'aqidah (belief) are those which concern or deal with the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim as part of his general knowledge for being a Muslim, such as matters pertaining of Rukun Islam, Rukun Imam and matters of halal (the allowable or the lawful) or haram (the prohibited or the unlawful).

(3) Whoever is found guilty of committing the offence of irtidad shall, before a sentence is passed on him, be required by the Court to repent within a period of not less than three days after he has been so found.

(4) where he is reluctant to repent and still continues with his attitude as regards the act he has done or the word he has uttered, the Court shall pronounce the death sentence on him and order the forfeiture of his property irrespective of whether such property was required before or after the commission of the offence to be held for the Baitul-Mal:

Provided that when he repents, whether the repentance is done before the death sentence is pronounced or after such pronouncement but before the sentence is carried out, he shall be free from the death sentence and his property ordered to be forfeited shall be returned to him:

Provided further that he shall be imprisoned for a term not exceeding five years.

PART II

Qisos

24. Both qisos and diyat shall apply to offences of homicide and causing bodily injuries.

25. Homicide shall be divided into three categories –
(a) Qatl-al-'amd (wilful killing);
(b) Qatl-syibhi-al-'amd (quasi-wilful killing); and
(c) Qatl-al-khata' (killing without intention).

26. (1) Whoever causes the death of a person by doing an act with the intention of causing death or bodily injury which in the ordinary course of nature is likely or sufficient to cause death; or by doing an act with the knowledge that his act is so imminently dangerous that it must in all probability cause death, is said to commit qatl-al-'amd.

(2) Whoever by doing an act with the intention or knowledge that the aforesaid act is likely to cause death, causes the death of any person whose death he neither intends nor knows himself to be likely to cause, is also said to commit qatl-al-'amd.

(3) Whoever by doing an act with the intention or knowledge that the aforesaid act is likely to cause death, causes the death of any person who death he neither intends nor knows himself to be likely to cause, is also said to commit qatl-al-'amd.

27. (1) Except as provided in subsection (2), whoever commits qatl-al-'amd shall be punished with death as qisos punishment.

(2) The punishment of death in subsection (1) shall not be imposed where –
(a) the offence is not proved by the evidence required under Part III; or
(b) notwithstanding such proof, the wali remits the qisos.

28. The wali may at any time before the punishment of death as the qisos punishment is executed, pardon the offender either with or without a diyat; and if the pardon is with a diyat, this shall be paid either in a lump sum or by instalments within a period of three years form the date of the final judgement, and if in the meantime the offender dies, the diyat shall be recoverable from his estate.

29. Where the punishment of death as qisos punishment is not imposed the offender shall be liable to the ta'zir punishment of imprisonment for life or having regards to the circumstances of the case to such term of imprisonment as in the opinion of the Court would lead the offender to repentance.

30. Whoever with the intention of causing injury to the body or mind of any person causes the death of that person or any other person by doing an act with or without a weapon which in the ordinary course of nature is not likely to cause death is said to commit qatl-al-syibhi-al-'amd.

31. Whoever commits qatl-al-syibhi-al-'amd shall pay diyat to the victim's wali and in addition thereto shall be punished with the ta'zir punishment of imprisonment for a term not exceeding fourteen years.

32. Whoever without an intention of causing death or injury causes the death of a person by doing an act which is not anticipated to cause the death of such person or any person or by doing an unlawful act which later becomes the cause for the death of such person is said to commit Qatl-al-khata'.

33. Whoever commits qatl-al-khata' shall pay diyat to the victim's wali and in addition thereto may be liable to the ta'zir punishment of imprisonment for a term not exceeding ten years.

34. Whoever causes pain, harm, disease, infirmity or injury to any person, or impairs or destroys or causes the loss of function of any organ of the body of any person or part thereof without causing his death is said to cause bodily injury.

35. (1) Whoever causes bodily injury to a person shall be punished with the qisos punishment, that is with similar bodily injury as that which he has inflicted upon his victim and where qisos punishment cannot be imposed or executed because the conditions required by the Syariah law are not fulfilled, the offender shall pay irsy to his victim and may be liable to ta'zir punishment of imprisonment.
    (2) The amount of irsy payable and the term of imprisonment to be imposed shall be fixed by the Syariah law and shall vary according to the nature and gravity of the injuries caused to the victim, and the circumstances in which the offence is committed.

36. For the purpose of awarding punishments, bodily injuries shall be classified as follows:
    (a) Itlaf-al-udhw (causing dismemberment of any organ of the body or injury to a part of or organ of the body);
    (b) Itlaf-solahiyyatu-al-udhw (causing destruction or permanent impairment of the function, of use of an organ of the body or permanently disfiguring such organ;
    (c) Syajjah (causing injury on the head or face which injury does not amount to itlaf-al-udhw or itlaf-solahiyyatu-al-udhw);
    (d) Jurh (causing injury on any part of the body save the head and the face which injury leaves a mark or wound whether temporary or permanent); and

(e) All other bodily injuries.

37. Qisos punishment shall not be imposed in the following cases:
   (a) Where the offender who has committed the qisos offence is dead;
   (b) Where the limb or the organ for which qisos punishment is to be applied is already non-functional or otherwise incapacitated;
   (c) Where pardon is given by the victim or his wali; or
   (d) Where a settlement (solh) and agreement between the victim and the offender has been made.

38. Where qisos punishment is not imposed –
   (a) The term of imprisonment as ta'zir punishment for causing itlaf-al-udhw and itlaf-solahiyyatu-al-udhw is ten years; and the irsy payable for causing the injury shall be as specified in Schedule II;
   (b) The term of imprisonment as ta'zir punishment and the irsy payable for causing syajjah shall be as specified in Schedule III; and
   (c) The term of imprisonment as ta'zir punishment and the irsy payable for causing jurh shall be as specified in Schedule IV.

PART III

Evidence

39. (1) Save where it is in conflict with the provisions of this Enactment, the Evidence Enactment of the Syariah Court 1991 shall apply for the purpose of proving offences under this Enactment.
   (2) All offences under this Enactment, whether ḥudūd offences or qisos offences or ta'zir offences shall be proved by oral testimonies or by confession made by the accused.

40. (1) The number of witnesses required to prove all offences under this Enactment except zina shall be at least two.
   (2) The number of witnesses required to prove zina shall not be less than be less than four.

41. (1) Each witness shall be an adult male Muslim who is akil baligh, and shall be a person who is just.
   (2) A person shall be considered just if he does what is required of him by Islam and avoids committing great sins and does not continuously commit lesser sins and further has istī'mal al-muru ah, (a sense of honour).
   (3) A person shall be deemed to be just, until the contrary is proved.

42. (1) To prove the charge against the accused and render him liable to ḥudūd or qisos punishment the evidence given shall be one of absolute certainty and free from any ambiguity or doubt.
   (2) Each witness shall state clearly that he has actually seen the act complained of and in the case of zine the four witnesses shall state that they have actually seen the act of penetration of the sex organ of the male partner into that of the female partner of the copulating pair and further there shall neither be contradiction nor inconsistency among the witnesses in such testimony.

43. (1) To make the accused liable to a ḥudūd punishment each witness shall maintain his testimony against the accused not only during the trial and thereafter but also during the execution of the punishment because if such testimony is withdrawn before the execution of the punishment the accused shall cease to be liable to the ḥudūd punishment, and if it is withdrawn at the time when the accused is undergoing the punishment, the punishment shall forthwith cease.

(2) In the case of zina, where one witness declines to give evidence, or gives evidence in support of the charge but later withdraws such evidence so that the number of witnesses in support of the charge becomes less than four, the charge of zine against the accused shall remain unproved and he shall cease to be liable to the ḥudūd punishment; but the remaining witnesses who have testified in support of the charge shall be guilty of an offence of qazaf.

44. (1) The best evidence to convict the accused and make him liable to ḥudūd punishment is his own confession.

(2) The confession must be made voluntarily and without any force before a judicial officer and shall afterwards be repeated before the trial judge during the course of the trial, and if the trial is one of zina the confession shall be repeated four time before the judge during the course of the trial:

Provided that both the making and the repetition of the confession must be without any threat, promise or inducement and must clearly prove in detail that the accused has actually committed the offence with which he is charged and that he understands that he will be punished for making such confession.

(3) The confession shall be admissible only against the accused who makes it, and cannot be used against any other person; and to be valid the confession must not be a retracted confession.

45. (1) A confession may be retracted by the accused who makes it at any time even while he is undergoing the punishment.

(2) If the confession is retracted before the execution of the punishment on him, the accused shall no longer be liable to punishment and if he retracts the confession at the time when he is undergoing the punishment such execution shall forthwith cease.

(3) If at any time before or at the time when the punishment is being executed the accused manages to escape from the authorities, he shall be deemed to have retracted the confession and as such the provision of subsection (2) shall apply.

46. (1) Save as provided in subsection (2) and (3) circumstantial evidence, though relevant, shall not be a valid method of proving a ḥudūd offence.

(2) In the case of zina, pregnancy or delivery of a baby by an unmarried woman shall constitute evidence on which to find her guilty of zina and therefore the ḥudūd punishment shall be passed on her unless she can prove to the contrary.

(3) In the case of drinking liquor or any other intoxicating drinks, the smell of liquor in the breath of the accused, or the fact of his vomiting liquor or any other intoxicating drinks or traces thereof, or the observation by the Court of the accused being in a state of intoxication shall be admissible as evidence to prove that he has committed the offence of syurb unless he can prove to the contrary.

47. Where the accused cannot be made liable to a ḥudūd punishment because the witnesses have withdrawn their testimonies as provided for in section 43 or because the accused has retracted his confession as provided for in section 45 or the evidence available does not fulfil; the conditions required to prove a ḥudūd offence, the accused may be liable to a ta'zir punishment; and the Court shall proceed to pass such punishment if there is sufficient evidence for that purpose.

PART IV

How Punishment is Carried Out

48. The ḥudūd punishment imposed under this Enactment shall not be suspended, substituted for any other punishment, reduced or pardoned or otherwise varied or altered.

49. Every sentence imposing a ḥudūd punishment and every death sentence imposed as qisos or ta'zir punishment under this Enactment shall be referred by the Special Syariah Trial Court which has passed the sentence to the Special Syariah Court of Appeal for confirmation and the punishment imposed shall not be carried out before such confirmation is obtained.

50. A ḥudūd punishment imposed, other than the punishment of death and rejam shall not be executed unless the offender is medically examined by a Muslim medical officer and certified to be fit by that officer.

51. If an offender is guilty of several offences, the punishment which shall be carried out on him shall be as follows:
    (a) If the punishments are of the same kind and graveness, only one punishment shall be carried out;
    (b) If the punishments are of the same kind, but of different graveness, only the severest punishment shall be carried out;
    (c) If the punishments are of different kinds, all shall be carried out; and
    (d) If one of the punishments is death all other punishments shall be set aside.

52. (1) The punishment of amputation of a hand shall mean an amputation of the hand at the wrist; that is the joint between the palm and the forearm.

    (2) The punishment of amputation of a foot shall mean an amputation of the foot in the middle of the foot in such a way that the heel may still be usable for walking and standing.

53. The punishment of whipping shall be carried out in accordance with the Rules specified in Schedule V.

54. The punishment of rejam shall not be carried out on a pregnant female offender until after she has delivered her child, and thereafter become clean of blood and is fit again to undergo the punishment; and in the event of the child being suckled by her, the rejam shall not be executed until after the completion of full two years of suckling unless there is a wet nurse who is willing to undertake to suckle the child during the said period.

55. The punishment of whipping shall not be executed on a pregnant female offender until after she has delivered her child, and thereafter become clean of blood and is fit again to undergo the punishment without hazard.

PART V

General Provisions

56. (1) Subject to subsection (2), this Enactment shall apply to every Muslim who is a mukallaf in respect of any offence committed by him in the State of Kelantan.
(2) Nothing in this Enactment shall preclude a non-Muslim from electing that this Enactment apply to him in respect of any offence committed by him within the State of Kelantan, and in the event of such non-Muslim electing as aforesaid, the provisions of this Enactment shall, mutatis mutandis, apply to him as they apply to a Muslim.

57. Where an offence is committed as a result of, or in furtherance of an abetment, assistance, conspiracy or plot, every person who abets or assists or conspires or plots for the commission of such offence shall be guilty of that offence and shall be liable to be punished with imprisonment as ta'zir punishment for a term not exceeding ten years.

58. When an offence is committed by several persons in furtherance of a common intention of all, each of such persons is liable for that offence in the same manner as if the offence were done by him alone and shall be liable to be punished with the ta'zir punishment of imprisonment not exceeding ten years.

59. Where several offenders commit sariqah, each of them shall be punished with the ḥudūd punishment as if each offender has committed it all alone:

Provided that the share obtained from the stolen property bye ach of them when divided equally amongst them, is equal to or exceeds the amount of nisab.

60. Whoever attempts to commit an offence under this Enactment shall be punished with the ta'zir punishment of imprisonment for a term not exceeding ten years.

61. Where a person has been tried or faced any proceeding for an offence under this Enactment, he shall not be tried and no proceeding shall be taken against him under the Penal Code in respect of the same or similar offence provided in the Code.

62. (1) All offences under this Enactment and the provisions relating thereto shall be interpreted according to the Syariah law and the precedents found therein; and reference to such law shall be made in respect of any matter not provided for in this Enactment.
(2) If any doubt or difficulty arises in the interpretation of any word, expression or term relating to Syariah law, the Court trying the case shall have jurisdiction to give meaning to such word, expression or term.

PART VI

Court

63. (1) There shall be established the Special Syariah Trial Court and the Special Syariah Court of Appeal.
(2) The Special Syariah Trial Court shall have jurisdiction to try offences under this Enactment.
(3) The Special Syariah Court of Appeal shall have jurisdiction to hear appeals from the decisions of the Special Syariah Trial Court.

64. The Courts established under section 63 shall be an addition to the Syariah courts established under the Administration of the Syariah Court Enactment 1982, and the provisions of that Enactment shall be appropriate matters apply to the Courts, unless they are in conflict with the provisions of this Enactment or are not intended by the provision of this Enactment.

65. The Syariah Criminal Procedure Enactment 1983 shall apply to all proceedings of the Courts with or without such modifications as the Courts think fit in the interest of justice.

66. When it is sitting to try an offence under this Enactment the Special Syariah Trial Court shall consist of three judges, two of who shall be ulamak; and the session shall be presided over by any one of the said judges.

67. When it is sitting to hear an appeal from the decision or order of the Special Syariah Trial Court, the Special Syariah Court of Appeal shall consist of five judges, three of who shall be ulamak and the session shall be presided over by any one of the said judge.

68. A person who hold or had held office as a judge of the High Court of Malaya or Borneo or the Supreme Court of Malaysia or any person who has the qualification to be appointed as a judge of any of those Courts may be appointed to be a judge; whilst an ulamak who may be appointed a judge shall be a person who holds or has held office as a Qadhi Besar or Mufti Kerajaan or any one who has the qualification to hold any of those offices and is known to have deep knowledge of Syariah Law.

69. (1) These judges shall be appointed by the His Royal Highness the Sultan by an Instrument of Appointment under His Sign Manual and Seal after consulting the State Service Commission and the Jumaah Ulama and in addition High Highness may also consult any other authority or body or individual who is ighHighness Opinion is considered fit and proper and such appointment shall be published in the Gazette.

(2) In making of the appointment under subsection (1), His Royal Highness the Sultan shall signify whether the appointee is the President of the Special Syariah Court of Appeal or the Chief Judge of the Special Syariah Trial Court or a judge of the Special Syariah Court of Appeal or a judge of the Special System Trial Court.

70. The principle of independence of the judiciary shall apply to the Courts and every judgement appointed this Enactment shall be free from interference from any authority or individual.

71. (1) Every judge is entitled to hold office until he voluntarily resigns from his office, unless in the meantime he is required to leave the service because of unsound mind or ill-health which has to be certified by not less than three medical experts or because he is found by an independent Judicial Commission to have committed an offence which renders him unfit to be a judge.

(2) Both the medical experts and the independent Judicial Commission shall be appointed by His Royal Highness the Sultan after consulting such authority, body or individual whom His Highness thinks fit and proper.

(3) The offence referred to in subsection (1) shall be an offence known to the secular law or the Syariah law and the evidence in support thereof must be clear.

72. (1) The salaries, allowances and other privileges of the judges shall be a charge on the Consolidated Fund of the State and shall not be less than those enjoyed by a judge of the High Court of Malaya or Borneo or of the Supreme Court of Malaysia.

(2) The Legislative Assembly of the Sate may make law to fix the salaries, allowances and other privileges of the judges of the Courts established by this Enactment.

SYARIAH CRIMINAL CODE (II) 29

SCHEDULE I

SYARIAH CRIMINAL CODE (II) 29

SCHEDULE I

Schedule I (attached to Section 53)

The Whipping Rules

1. The Rules in this Schedule shall apply to the execution of whipping punishment under section 53 of this Enactment.
2. A whipping punishment to be executed on an offender shall be carried out by an officer specifically authorised by the prison authority at a place and time directed by the Court and shall be in the presence of and witnessed by a Muslim medical officer and at least four adult male Muslims as witnesses; provided that before the punishment is carried out the offender shall first be examined by the medical officer and certified by him to be fit to receive such punishment.
3. No whipping punishment shall be carried out on an offender unless a period of fourteen days have lapsed after the date of the judgement; provided that in the event of an appeal, the punishment shall be carried out as soon as possible after the punishment is confirmed by the Special Syariah Court of Appeal.
4. The whipping punishment shall be carried out by the aforesaid officer hitting the offender with a rattan, the size of which (save in the case mentioned in Rule 8(2)(ii)) shall be one meter long and one centimeter in diameter.
5. The whipping shall be administered in such a way that the strokes shall be well distributed on all parts of the body except the face, head, chest and private parts.
6. The whipping shall be carried out with a moderate force in that the officer administering the punishment shall not raise the rattan whip high up to the level of his head; and such whipping shall be given consecutively and shall not exceed the number of strokes ordered by the Court.
7. When receiving the whipping, the offender shall be in standing position and clothed in thin clothing which covers the 'aurat according to Syariah law.
8. (1) If during the course of the whipping being administered to him the offender is found to be incapable of receiving further whipping, on the certification by the medical officer, the whipping shall forthwith stop and postponed until

the Court shall give a new direction as to the resumption of the punishment; and in the meantime the offender shall be detained in prison or set free on bail.

(2) Such direction shall be made on the basis of a report made by the aforesaid medical officer and shall be as follows:

(i) if according to the report the offender is likely to recover from his present incapacity, the punishment shall be resumed as soon he recovers from his ailments; and (ii) if according to the report the offender is not likely to recover from his present incapacity, notwithstanding the ailments, the punishment shall also be resumed at a suitable time but the rattan to be used to continue the whipping shall be lighter and of smaller size than that specified in Rule 4 of these Rules.

Notes

CHAPTER I

1. Rudolph Peters, *Crime and Punishment in Islam: Theory and Practice from the Sixteenth to the Twentieth Century*, Cambridge, UK: Cambridge University Press, 2005, 144–145.
2. This is also conveyed in a legal maxim of fiqh: "there shall be no ijtihad when there is a textual injuction—*lā ijtihāda fī'l-naṣṣ*." It may be added, however, that legal maxims (*qawāʿid kulliyyah fiqhiyyah*) are advisory and instructive in principle, not binding. Further advances in knowledge and science, or in people's life conditions and experiences, may provide cause for fresh reflection and a basis therefore to revise a legal maxim. For an extended selection of these maxims, see Mohammad Hashim Kamali, *Shariah Law: Questions and Answers*, Oxford: Oneworld Publications, 2017, 216–249.
3. The five pillars of Islam are faith in God, the daily prayers (*ṣalāh*), paying the poor due (*zakāh*), fasting during Ramadan, and the hajj (pilgrimage).
4. Cf. Mohammad Hashim Kamali, "Strictly from the Qur'anic Perspective," *New Straits Times* (Kuala Lumpur), 25 April 2009, 14.
5. ʿAbd al-Raḥmān b. Muḥammad Awaḍ al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib al-Arbaʿah*, new rev. ed., Cairo: Dār al-Ghad al-Jadīd, 2005, 1148, discusses the scholastic differences on the number of *ḥudūd* and then records the minimalist account of *ḥudūd* to three, namely the *ḥudūd* of adultery, slander, and theft, on which there is no disagreement, whereas disagreement abounds on almost every other addition to this minimum.
6. Kelantan has remained under PAS ever since, whereas Terengganu changed hands in the 2004 election and is currently also ruled by the Islamic Party of Malaysia (PAS).
7. Official title: Shariah Criminal Code (II) Bill 1993. Appended at the end of this volume, the reader will find a copy of the standard English translation of the Hudud Bill of Kelantan 1993 that was circulated in Malaysia at the time.

8. The only country of the Muslim world perhaps with an impressive record of having held fourteen successive elections without major problems since its independence in 1957.
9. Referring to this aspect of the *ḥudūd*, the then PAS assistant secretary general, Takiyuddin Hassan, confirmed that "offences under *ḥudūd* would only be tried in the shariah court as it is clearly stated in our Enactment." See article by Nik Imran Abdullah et al., "Confusion over DAP's Stand: PAS Leaders at Odds over whether Partner Agreeable on *Hudud*," *New Straits Times* (Kuala Lumpur), 13 October 2011, 11.

CHAPTER II

1. Cf. M. Cheriff Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, New York: Cambridge University Press, 2014, 120; Muḥammad Sālim al-ʿAwā, *al-Fiqh al-Islāmī fī Ṭarīq al-Tajdīd*, 3rd enhanced ed., Beirut: al-Maktab al-Islāmī, 1419/1998, 169. See also generally Rudolph Peters, *Crime and Punishment in Islam: Theory and Practice from the Sixteenth to the Twentieth Centuries*, Cambridge, UK: Cambridge University Press, 2005.
2. Abd al-Qādir ʿAwdah, *al-Tashrīʿ al-Jināʾī al-Islāmī Muqārinah biʾl-Qānūn al-Waḍʿi*, 13th ed., 2 vols., Beirut: Muʾassasah al-Risālah, 1415/1994, 1:629.
3. Ibid., 1:630.
4. Ibid.

CHAPTER III

1. Cf. Burhān al-Dīn al-Marghīnānī, *al-Hidāyah*, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d., vol. 2, 94; Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ*, Beirut: Dār al-Maʿrifah, 1406/1986, vol. 11, 36; al-Jazīrī, *al-Fiqh ʿalāʾl-Madhāhib*, 1168; Wizārat al-Awqāf waʾl-Shuʾūn al-Islāmiyyah, *al-Mawsūʿah al-Fiqhiyyah*, Kuwait: Dār al-Salāsil, 1434/2003, vol. 7, 130; Aḥmad Fatḥī Bahnasī, *al-ʿUqūbah fī l-Fiqh al-Islāmī*, 6th ed., Cairo: Dār al-Shurūq, 1409/1989, 123.
2. Cf. Fazlur Rahman, "The Concept of Hadd in Islamic Law," *Islamic Studies* 4 (1965), 237; Kassim Ahmad, "Resolving the 'Ḥudūd' Law Dilemma," *New Straits Times* (Kuala Lumpur), 4 December 1993, 13.
3. al-Marghīnānī, *al-Hidāyah*, 2:94; al-Sarakhsī, *al-Mabsūṭ*, 9:36.
4. Abū al-Ḥasan al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah*, 3rd ed., Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1393/1973, 221; see also, al-Marghīnānī, *al-Hidāyah*, 2:94.
5. Bahnasī, *al-ʿUqūbah*, 124; Mohamed S. el-Awa, *Punishment in Islamic Law*, Indianapolis: American Trust Publications, 1982, 30.
6. Cf. Fazlur Rahman, "The Concept of Hadd," 238.
7. Ibid., 240.

8. Sayyid Abūl Āʿla Maududi, *The Islamic Law and Constitution*, Lahore: Islamic Publication Ltd., reprint 1979, 142.
9. Abū Jaʿfar Yaʿqūb Ibn Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī, Tafsīr al-Qurʾān al-ʿAẓīm* (also known as *Tafsīr al-Ṭabarī*), Beirut: Dār al-Maʿrifah, 1400/1980, 8:89.
10. Fatḥī b. al-Ṭayyib al-Khammāsī, *al-Ḍarūrah al-Marḥaliyyah fi-Taṭbīq al-Qānūn al-Jināʾī al-Islāmī*, Damascus and Beirut: Dār Qutaybah, 1421/2001, 202.
11. As quoted in al-Khammāsī, *al-Ḍarūrah*, 198.
12. Muḥammad Abū Zahrah, *al-Jarīmah wa'l ʿUqūbah fi'l-Fiqh al-Islāmī: al-ʿUqūbah*, 10th ed., ed. Muḥyī al-Dīn Fatḥī al-Shaludī, Cairo: Dār al-Fikr al-ʿArabī, 2006, 134–136.
13. Shaila Khoshy, "PAS: Our Right to Pass Shariah Law," *The Star* (Kuala Lumpur), 19 August 2003, 23.
14. Ibid.
15. Muwaffaq al-Dīn Ibn Qudāmah, *al-Mughnī*, Beirut: Dār al-Kitāb al-ʿArabī, 1403/1983, 1:315; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:353.
16. Cf. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 7:133–134.
17. Ibid., 7:134.
18. Muḥammad b. Idrīs al-Shāfiʿī, *Kitāb al-Umm*, Beirut 1413/1993, 6:229. Also quoted in al-Khammāsī, *al-Ḍarūrah*, 192.
19. Aḥmad Taqī al-Dīn Ibn Taymiyyah, *Majmūʿ al-Fatāwā Shaykh al-Islām Ibn Taymiyyah*, Riyadh, n.d., 29 vols., 15:202; Abū Zahrah, *al-ʿUqūbah*, 244; al-Khammāsī, *al-Ḍarūrah*, 193.
20. Ibid. [[Clarify—ibid. to which ref. above?]]
21. Cf. Ibn Qudāmah, *al-Mughnī*, 1:316; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:353.
22. Shihāb al-Dīn al-Ramlī, *Nihāyah al-Muḥtāj*, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1386/1967, 7:8; Abū Zahrah, *al-ʿUqūbah*, 250; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:354.
23. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:354; Abū Zahrah, *al-ʿUqūbah*, 246.
24. ʿAlāʾ al-Dīn al-Kāsānī, al-Kāsānī, *Badāʾiʿ al-Ṣanāʾīʿ fī Tartīb al-Sharāʾiʿ*, Cairo: Maṭbaʿah al-Jamaliyyah 1328/1910, 2nd ed., Beirut: Dār al-Kitāb al-ʿArabī, 1982; Ibu Qudāmah, *al-Mughnī*, 10:316; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:354.
25. Abū Zahrah, *al-ʿUqūbah*, 247.
26. Ibn Qayyim aI-Jawziyyah, *Iʿlām al-Muwaqqiʿīn*, ed. Muḥammad Munīr al-Dimashqī, Cairo: Idārah al-Ṭabāʿah al-Munīriyyah, n.d., 2:97–98; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:355.
27. al-Khammāsī, *al-Ḍarūrah*, 191 and 193.
28. Abū Muḥammad ʿAlī b. Aḥmad Ibn Ḥazm al-Ẓāhirī, *al-Muḥallā*, ed. A. G. Sulāyman al-Bandarī, Beirut: Dār al-Kutub al-ʿIlmiyyah, 1468/1988, 12:36.
29. Tawfīq Muḥammad al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah fi'l-Fiqh al-Jināʾī al-Islāmī*, Cairo: Dār al-Shuruq, 1422/2001, 4:296.
30. *Ṣaḥīḥ al-Bukhārī*, Eng. trans. Muhammad Muhsin Khan, 6th ed., Lahore: Kazi Publications, 1983, 8:533–534, hadith no. 812. See also *Ṣaḥīḥ al-Bukhāri, Kitāb al-Ḥudūd, Bāb Idha Aqarra bi'l-Ḥudūd wa-lam Yubayyin*, hadith no. 6823.

31. See for details ʿAbd al-Raḥmān b. Muḥammad ʿAwaḍ al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib al-Arbaʿah*, new rev. ed., al-Mansurah, Egypt: Dār al-Ghad al-Jadīd, 2005, 1211. Al-Jazīrī recounts yet another hadith on the same page on the authority of Saʿīd b. al-Mussayib, who said: "It has reached me that a person who had embraced Islam by the name Hizāl complained to the Prophet concerning an incident of *zinā* by another man, to which the Prophet responded: 'O Hizal, if you had covered this with your wrapper, it would have been better for you (*Ya Hizāl! law satartahu bi-ridāʾika, kāna khayran laka*).'"
32. Aḥmad b. Ḥanbal, *Musnad Ibn Ḥanbal: Musnad al-Makkiyīn*, hadith Wāthilah b. al-Asqaʿ min al-Shamiyyīn, Cairo: Dār al- Ḥadīth, 2005. See also al-Khammāsī, *al-Ḍarūrah*, 195.
33. Muslim b. Ḥājjāj al-Nishāpūrī, *Mukhtaṣar Ṣaḥīḥ Muslim*, ed. M. Nāṣir al-Dīn al-Albānī, 2nd ed., Beirut: Dār-Maktab al-Islāmī, 1404/1984, 279, Hadith no. 1049.
34. Abū Yūsuf Yaʿqūb b. Ibrāhīm, *Kitāb al-Kharāj*, 5th ed. Cairo: al-Maṭbaʿah al-Salafiyyah, 1396/1976, 164; Abū ʿĪsā Muḥammad al-Tirmidhī, *Sunan al-Tirmidhī*, Beirut: Dār al-Fikr, 1400/1980, 2:439, hadith no. 1447; ʿAbd Allāh al-Khaṭīb al-Tabrīzī, *Mishkāt al-Masābiḥ*, ed. Muḥammad Nāṣir al-Dīn al-Albānī, 2nd ed., Beirut: al-Maktab al-Islāmī, 1399/1979, 2:1061, hadith no. 3570. For a discussion, see also Muṣṭafā Shalabī, *al-Fiqh al-Islāmī Bayn al-Mithāliyyah wa'l-wāqiʿiyyah*, Beirut: al-Dār al-Jamiʿiyyah, 1982, 232–233.
35. Abū Yūsuf Yaʿqūb b. Ibrāhīm, *Kitāb al-Kharāj*, 5th ed. Cairo: al-Maṭbaʿah al-Salafiyyah, 1396/1976, 165.
36. *Ṣaḥīḥ al-Bukhārī*, Eng. trans., Muhsin Khan, 8:512, hadith no. 778.
37. Cf. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1144.
38. al-Nawawī, *Riyāḍ al-Ṣāliḥīn*, 488, hadith 1530. See also for a discussion al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1212.
39. For details on *satr al-ʿawrat*, see Mohammad Hashim Kamali, *Freedom of Expression in Islam*, 123–127.
40. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1212.
41. Ibid.
42. Cf. Wahbah al-Zuḥaylī, *Qaḍāyā al-Fiqh*, 333–334. This hadith is recorded in *Ṣaḥīḥ al-Bukhārī, Kitāb al-muhāribīn min ahl al-kufr wa'l-riddah, bāb idhā uqirra bi'l-ḥadd wa-lam yubayyin*, hadith 6437.
43. The meaning of "fixed punishment" has been most clearly articulated perhaps in the Hudud Bill of Kelantan Malaysia 1993, so as to say that "the *hudud* punishments shall not be suspended, substituted for any other punishment, reduced or pardoned or otherwise varied or altered" (clause 48).
44. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:76 and 620.
45. Ibid., 621.
46. Abū Zahrah, *al-ʿUqūbah*, 65.
47. Shihāb al-Dīn al-Qarāfī, *Kitāb al-Furūq*, Cairo: Maṭbaʿah Dār al-Iḥyāʾ al-Kutub al-ʿArabiyyah, 1346/1928, 141.

48. Fazlur Rahman, "The Concept of Hadd," 242.
49. Ibid., 248–250.
50. For this and other legal maxims that immediately follow, see, in alphabetical order, Muʾassasah Zayid b. Sultan al-Nahyan and Majmaʿ al-Fiqh al-Islāmī al-Duwalī, *Muʿallimah Zayid liʾl-Qawāʿid al-Fiqhiyyah waʾl-Uṣūliyyah*, 41 vols., Abu Dhabi, 1434/2013.
51. Thus, if in retaliation (*qiṣāṣ*) a relative exonerates his/her part, or some relatives do, but not others, the whole of retaliation collapses.
52. Prevention is thus preferable to compensation, retaliation, and punishment.
53. Thus, if someone is convicted of adultery twice, or of slander more than once, he will most likely be punished only once.

CHAPTER V

1. Cf. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 14:21. Shii law records similar positions and a roughly parallel discourse over the issues involved. See, for details, Muḥaqqiq al-Ḥillī, *Mokhtasar-e Nafi'*, Persian translation (from Arabic) by Muḥammad Taqī Danish-pazhoh, Tehran: Bongah-e Tarjomah wa Nashr-e Kitab, 1343/1964, 351f.
2. Quoted in *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:19–20, from *Ṣaḥīḥ al-Bukhārī*, hadith bearing the title "Ayy al-Dhanb Aʿẓam."
3. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim* (hadith no. 33), *Kitāb al-Ômān, bāb lā yadkhulu al-jannah*, quoted also in *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), vol. 14:20.
4. Hadith "*ḥurmatu nisāʾ al-mujāhidin,*" in *al-Mawsūʿah al-Fiqhiyyah*, vol. 24:20. The hadith is as follows: "The prohibition (or sanctity) of the women of *mujāhidin* (those engaged in jihad) to those who have stayed behind (i.e., the home-dwellers *al-qāʿidīn*) is like the prohibition of their own mothers to them. If a man of the latter betrays the former by attempting to commit *zinā* with their women, he shall be at risk on the day of resurection of the *mujāhid* standing up and taking any of his good deeds as he may choose."
5. al-Jazīrī, *al-Fiqh ʿalāʾl-Madhāhib*, 1180; *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:38–47; al-Ḥillī, *Mokhtasar-e Nafi'*, 353.
6. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:41, records these details quoting the hadith "Istijwāb Māʿiz" (Māʿiz's interrogation) from al-Bukhārī and Abū Dāwūd.
7. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:42.
8. Quoted in *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:31, hadith narrated by Ibn ʿAbbās. See also http://articles.islamweb.net/media/index.php?id=78251&lang=A&page=article.
9. Ibid. Hadith recorded in al-Bayhaqī, Dāʾiratul Maʿarif al-ʿUthmaniyyah edition, 8:235.
10. Imam Ḥāfiẓ Abū ʿĪsā Muḥammad b. ʿĪsā al-Tirmidhī, *Jāmiʿ al-Tirmidhī*, English trans. by Abū Khalīl, 3:239, Riyadh: Maktaba Dār al-Salam, 2007, hadith 1454.

11. Cf. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:43; al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1193.
12. Bibi v. State, 1985 PLD Fed. Shariat Ct. 120. See also Asma Jahangir and Hina Jilani, *The Hudud Ordinances, a Divine Sanction?* Lahore: Rhotas Books, 1990, 88.
13. Bibi v. State, 1985 PLD Fed. Shariat Ct. 120. See also *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:32.
14. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:32; al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1193.
15. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1194.
16. Ibid., 1193–1194.
17. Sulaymān b. Khalaf Abū 'l-Walīd al-Bājī, al-*Muntaqā Sharḥ al-Muwaṭṭaʾ*, ed. ʿAbd al-Qādir ʿAṭa, Beirut: Dār al-Kutub al-ʿIlmiyyah, 1999, 7:146.
18. Cf. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1193; also Peters, *Crime and Punishment*, 62.
19. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:43.
20. Syed Akbar Ali, "Syariah Criminal Code Not without Loopholes," *New Straits Times* (Kuala Lumpur), 29 November 1993.
21. Ibid.
22. Cf. Abd al-Karīm Zaydān, *Niẓām al-Qaḍaʾ fī'l-Sharīʿah al-Islāmiyyah*, Baghdad: Maṭbaʿah al-ʿĀnī, 1404/1984, 220.
23. Brenda Benedict, "Islamic View," including an interview with Nik Noriani Nik Badli Shah, *The Star* (Kuala Lumpur), 2 February 2004, 3.
24. Ibid.
25. Norani Othman, "Implementation of Shari'ah Criminal Law in Modern Society: Some Sociological Questions," paper presented at the ISIS forum, Kuala Lumpur, 19 November 1993, 1–3.
26. Ustaz Nakhaie Ahmad, quoted in Mazian Nordin, "Many Questions on Ḥudūd Laws Still Unanswered," *New Straits Times* (Kuala Lumpur), 19 November 1993.
27. Ibn Qudāmah, *al-Mughnī*, 192; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:441.
28. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1193.
29. Shams al-Dīn al-Shaykh Muḥammad b. ʿArafah al-Dusūqī, *Ḥāshiyah al-Dusūqī ʿalā al-Sharḥ al-Kabīr*, Cairo: ʿĪsā al-Ḥalabī, n.d., 4:319. See also *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 14:43.
30. Muhammad Ata Sidahmad, *The Ḥudūd*, Kuala Lumpur: Perpustakaan Negara, 1995, 174.
31. Wahbah al-Zuḥaylī, *Qaḍāyā al-Fiqh wa'l-Fikr al-Muʿāṣir*, Damascus: Dār al-Fikr, 2007, 444.
32. Cf. ʿAlī Aḥmad al-Marʿī, *al-Qiṣāṣ wa'l-Ḥudūd fī'l-Fiqh al-Islāmī*, 2nd ed. Beirut: Dār Iqrāʾ, 1402/1982, 64.
33. al-Ḥillī, *Mokhtasar-e Nafi'*, 353; Peters, *Crime and Punishment*, 34 and 61.
34. Abū 'l-Walīd Muḥammad Ibn Rushd al-Qurṭubī (known as Ibn Rushd al-Ḥafīd), *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, Lahore: Faran Academy, n.d., 2:325.
35. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1211.
36. Cf. el-Awa, *Punishment*, 19.

37. Muḥammad Rashīd Riḍā, *Tafsīr al-Manār,* 4th ed., vol. 5, Cairo: Maṭbaʿah al-Manar, 1373/1953, 5:25.
38. Abū Zahrah, *al-Uqūbah,* 103–104.
39. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib,* 1214–1215.
40. Sayyid Abūl Āʿla Maududi, *Tafhīm al-Qurʾān,* vol. 3, Delhi: n.p., 1963, 3:321–323; Mohammad Suleman Siddiqi, "The Concept of Hudud and Its Significance," *Islamic Culture* 55 (1981), 198.
41. Muḥammad b. ʿAlī al-Shawkānī, *Nayl al-Awṭār Sharḥ Muntaqā al-Akhbār,* Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d., 7:97–100; see also for these and other hadiths Jamāl al-Dīn al-Zaylāʿī, *Naṣb al-Rāyah li-Aḥādith al-Hidāyah,* 2nd ed., Beirut: al-Maktab al-Islāmī, 1393 H, 3:328–383; al Sarakhsī, *al-Mabsūṭ,* 9:36ff.
42. al-Zaylāʿī, *Naṣb al-Rāyah,* 3:329.
43. al-Sarakhsī, *al-Mabsūṭ,* 9:43–44.
44. Shihāb al-Dīn Maḥmūd al-Alūsī, *Rūḥ al-Maʿānī fī Tafsīr al-Qurʾān al-ʿAẓīm,* 4th ed., Cairo: Idārah al-Ṭabāʿah al-Munīriyyah, 1405/1985, 18:79.
45. *The Translation of the Meaning of Ṣaḥīḥ al-Bukhārī by Muhammad Muhsin Khan,* 6th ed., Lahore: Kazi Publications, 1983, 8:526, hadith no. 803.
46. al-Shawkānī, *Nayl al-Awṭār,* 7:100.
47. Jamāl al-Dīn al-Zaylāʿī, *Tabyīn al-Ḥaqāʾiq fī Sharḥ Kanz al-Daqāʾiq,* Egypt, Bulaq: al-Maṭbaʿah al-Amiriyyah, 1313 AH, 3:174.
48. Cf. ʿAli Manṣūr, *Niẓām al-Tajrīm wa'l-ʿIqāb fī l-Islām,* Medina: Muʾassasah al-Zahrā, 1396/1976, 175ff.
49. See for details al-Zaylāʿī, *Tabyīn,* 3:175; Manṣūr, *Niẓām al-Tajrīm,* 176.
50. For further detail on *naskh* and the differences of *madhāhib* therein see Mohammad H. Kamali, *Principles of Islamic Jurisprudence,* Cambridge: Islamic Texts Society, 2003, 202–228.
51. Cf. Manṣūr, *Niẓām al-Tajrīm,* 172.
52. al-Alūsī, *Rūḥ al-Maʿānī,* 8:79.
53. al-Sarakhsī, *al-Mabsūṭ,* 9:44–45; Manṣūr, *Niẓām al-Tajrīm,* at 181–182.
54. Cf. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib,* 1179.
55. Manṣūr, *Niẓām al-Tajrīm,* 181–182.
56. Ibid., 182–183; Abū Zahrah, *al-ʿUqūbah,* 100ff.
57. *Ṣaḥīḥ al Bukhārī,* trans. Muhsin Khan, 7:527, hadith 804; Abū Zahrah, *al-ʿUqūbah,* 101; Manṣūr, *Niẓām al-Tajrīm,* 182–183.
58. Abū Zahrah, *al-ʿUqūbah,* 101 Manṣūr, *Niẓām al-Tajrīm,* 101–102; ʿAwdah, *al-Tashrīʿ al-Jināʾī,* 2:380. See also al-Sarakhsī, *al-Mabsūṭ,* 9:45.
59. Manṣūr, *Niẓām al-Tajrīm,* 182.
60. Abū Zahrah, *al-ʿUqūbah,* 98–105.
61. Q. al-Māʾidah, 5:43.
62. Abū Zahrah, *al-ʿUqūbah,* 104.
63. Suleman Siddiqi, "The Concept of Hudud," 191–207 at 195.
64. Ibid., 197.

65. Manṣūr, *Niẓām al-Tajrīm*, 182–183.
66. Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀm: Ikhrāj Jadīd fī'l-Tartīb wa'l-Tabwīb wa'l Ziyādat*, Damascus: Dār al-Qalam, 1st ed., 1418/1991, 1:290.
67. al-Zarqā, *al-Madkhal*, 1:283.
68. al-Zarqā, *al-Madkhal*, 1:291.
69. Bassiouni, *The Shari'a and Islamic Criminal Justice*, 136.
70. Yūsuf al-Qaraḍāwī, *Ḥawla Qaḍāya al-Islām wa'l-ʿAṣr*, 3rd ed., Cairo: Maktabah Wahbah, 1427/2006, 96.
71. Ibid., 96–97.
72. http://www.virtualmosque.com/islam-studies/faqs-and-fatwas/review-of-gomaas-responding-from-the-tradition/ (accessed 2 October 2015). See also Sheikh Ali Gomaa, *Responding from the Tradition: One Hundred Contemporary Fatwas by the Grand Mufti of Egypt*, Louisville, KY: Fons Vitae, 2011.
73. "Liwāṭ," *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 35:339–340.
74. al-Ḥillī, *Mokhtasar-e Nafi'*, 356; Peters, *Crime and Punishment*, 61.
75. al-Ḥillī, *Mokhtasar-e Nafi'*, 356–357.
76. As quoted in *al-Mawsūʿah al-Fiqhiyyah*, 35:340. The hadith is recorded by Aḥmad b. Ḥanbal in his *Musnad* (1:309) and al-Ḥākim in his *al-Mustadrak* (4:356).
77. Abū Dāwūd, *Sunan Abī Dāwūd, Kitāb al-ḥudūd*, hadith no. 4462; *Sunan al-Tirmidhī, Kitāb al-ḥudūd*, hadith no. 1456.
78. All three reports are quoted in al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1216. Abū Zahrah, *al-ʿUqūbah*, 180–181, also quotes the same hadith reports.
79. "Liwāṭ," *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 35:340.
80. Cf. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1216; Peters, *Crime and Punishment*, 61.
81. al-Ḥillī, *Mokhtasar-e Nafi'*, 356–357.
82. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1217.
83. See for details Abū Zahrah, *al-ʿUqūbah*, 180–181.
84. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, quotes other hadith reports on the subject at 1220–1221, all of which concur that anal sex with one's wife is sinful and emphatically denounced.
85. Abū Zahrah, *al-ʿUqūbah*, 181, adds the somewhat questionable comment that *siḥāq* is common in countries and places that do not practice female genital mutilation (FMG), like Syria, but that it is rarely practiced in Egypt where FMG is widely practiced.
86. This hadith has been reported in slightly different versions. Al-Muttāqī al-Hindī, *Kanz al-ʿUmmāl*'s section on *zinā*, hadith no. 13103, adds a sentence, "When a man sexually approaches another man they are like adulterers (*idha jaʾa al-rajulu al-rajula fa-huma zaniyan*)." Jalāl al-Dīn al-Suyūṭī (*al-Jāmiʿ al-Ṣaghīr*) has a similar hadith (no. 12699) on the authority of Abī Mūsā with the following words: "*la-tubāshir al-marʾatu al-marʾata illā wa-huma zāniyatan, wa-lā yubāshir al-rajulu al-rajula illā wa-huma zāniyān.*" Abū Zahrah, *al-ʿUqūbah*, 181, also quotes the shorter versions. See also al-Ḥillī, *Mokhtasar-e Nafi'*, 356, who discusses *siḥāq* but does not quote any hadith.

87. This is considered as a fair (*ḥasan*) hadith. Abū Dāwūd and al-Tirmidhī have reported it, see al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1195. See also http://majles.alukah.net/t9073/.
88. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1195.
89. Ibn Mājah, *Sunan Ibn Mājah*, Lahore, Pakistan: Kazi Publications, 1993.
90. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1195.
91. al-Khammāsī, *al-Ḍarūrah*, 222. This was, in fact, the practice of the Ottoman caliphate—but this subject will be revisited in our conclusion at the end of this volume.

CHAPTER VI

1. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:292–294; al-Ḥillī, *Mokhtasar-e Nafi'*, 362.
2. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:579.
3. The Ẓāhirīs have held, however, the somewhat exaggerated position that both the ascendants and descendants are liable to the prescribed punishment of theft if they steal, saying that the hadith that maintains otherwise has been abrogated by the Qur'anic verses on inheritance (*ayāt al-mawārith*). See for details ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:577. See also https://sunnah.com/urn/1323800 (accessed 17 January 2017)
4. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:75; Ibn Qudāmah, *al-Mughnī*, 10:287; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:578; al-Ḥillī, *Mokhtasar-e Nafi'*, 362.
5. al-Ṭabarsī, *Mustadrak al-Wasāʾil*, 13:135.
6. Ibn Qudāmah, *al-Mughnī*, 10:242; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:582.
7. Both hadiths are quoted in al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:334–335.
8. Ibid., 2:335.
9. Ibn Qayyim al-Jawziyyah, *Iʿlām al-Muwaqqiʿīn*, 2:64.
10. Cf. al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:373; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:581.
11. al-ʿAwā, *al-Fiqh al-Islāmī*, 163–164. Al-ʿAwā recounts the two differential assessments on the subject of quorum, one by Azhar university scholars, and the other by the late Dr. Ismāʿīl Maʿtūq, a member of the Egyptian Parliament. They worked on two separate projects relating to the preparation of a draft penal law for Egypt, one of which was being prepared by Azhar University and the other by Dr. Maʿtūq. One of them assessed the quorum of theft at two grams of pure gold and the other at 4.457 grams of pure gold. Each thought that this would be equivalent to the ten dirhams recorded by the Ḥanafī school. Al-ʿAwā is critical of both positions, which he considered to be based on a *taqlīdī* (imitationist) approach.
12. al-ʿAwā, *al-Fiqh al-Islāmī*, 163.
13. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:305
14. Cf. al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:336; *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:307–308; al-Ḥillī, *Mokhtasar-e Nafi'*, 362.
15. The kidnapping of a free person is a different crime and does not invoke the prescribed penalty for theft, since a free person cannot be owned and has no market value. This is also the case with the Qur'an, which was, initially at least,

not sellable, but later the fatwa of the leading schools changed over this. Stealing from a child is also not punished with mutilation, as there would be doubt over his ability at safekeeping.

16. *al-Mawsūʿah al-Fiqhiyyah*, 24:308; al-Ḥillī, *Mokhtasar-e Nafi'*, 362.
17. Cf. al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:335–338; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:652–653; *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 24:308.
18. Ibid., al-Ḥillī, *Mokhtasar-e Nafi'*, 362 n.
19. al-ʿAwā, *al-Fiqh al-Islāmī*, 161.
20. al-ʿAwā, *al-Fiqh al-Islāmī*, 162.
21. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:616.
22. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:613.
23. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:615.
24. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:84; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:618.
25. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:620–621.
26. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1229–1230. Al-Jazīrī further adds that the narrators of this hadith are reliable (*thiqāt*) and that it is recorded in Sunan Abū Dāwūd, *Sunan al-Nasāʾī*, and the *Musnad* of Imam Aḥmad b. Ḥanbal.
27. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1230; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:615–617.
28. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:612.
29. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1230.
30. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:652; ʿAwdah also cites the precedent of caliph ʿAlī on the point. See also al-Ḥillī, *Mokhtasar-e Nafi'*, 363.
31. al-Ḥillī, *Mokhtasar-e Nafi'*, 364.
32. Ibn Ḥazm al-Andalūsī, *al-Muḥallā*, ed. A. G. Sulaymān al-Bandarī, Beirut: Dār al-Kutub alʿIlmiyyah, 1468/1988, 9:62: ʿAlī A. Manṣūr, *Niẓām al-Tajrīm wa'l ʿIqāb fī 'l-Islām*, Medina Munawwarah, Muʾassasah al-Zahrā, 1396/1976, 331.
33. el-Awa, *Punishment in Islamic Law*, 6.
34. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:99.
35. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:621–622; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:55.
36. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1252.
37. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1252.
38. https://en.wikipedia.org/wiki/Islamic_criminal_jurisprudence (accessed 28 October 2016).

CHAPTER VII

1. Muhammad Ata al-Sid Sidahmad, *Islamic Criminal Law: The Hudud*, Petaling Jaya: Eagle Trading, 1995, 62; See also Mohammad Shabbir, *Outlines of Criminal Law and Justice in Islam*, Kuala Lumpur: International Law Book Services, 2003, 173.
2. Nadirsyah Hosen, "Law, Religion and Security," in Silvio Ferrari, ed., *Routledge Handbook of Law and Religion*, Abingdon, UK and New York: Routledge, 2015, 338.

3. Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition," *Muslim World* 91, nos. 3–4 (2001), 293–310 at 295.
4. When considering illegitimate state action marked as self-defence, such as the bombings of Nagasaki and Hiroshima, and US military attacks on Afghanistan and Iraq, it quickly becomes clear that the existing definitions of terrorism are on the whole unsatisfactory.
5. Abū al-Ḥusayn Muslim b. al-Ḥajjāj al-Nishapūrī, *Ṣaḥīḥ Muslim, Kitāb al-Qasamah wa'l-Muḥāribīn wa'l-Qiṣāṣ wa'l-Diyah, Bāb Ḥukm al-muḥāribin wa'l-murtaddīn*, hadith 1671, Beirut: Dār al-Kutub al-ʿIlmiyyah, 2006, 659.
6. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim, Kitāb al-Imārah, bāb man ḥamala ʿalaynā al-silāḥa*, ed. al-Albānī, hadith 1235.
7. This is a slight variation of the previous hadith on the authority of Salamah b. al-Akwaʿ, whereas the first is on the authority of ʿAbd Allāh b. ʿUmar. Both are deemed as reliable.
8. al-Nawawī, *Riyāḍ al-Ṣāliḥīn*, ed. al-Albānī, 2nd ed., Beirut: Dār al-Maktab al-Islāmī, 1418/1998, hadith 1527.
9. Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa-Adillatuh*, Beirut: Dār al-Fikr, 1417/1996, 6:128.
10. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:7.
11. Sayyid al-Sābiq, *Fiqh al-Sunnah*, 21st printing, Dār al-Fatḥ li'l-Aʿlām al-ʿArabī, 1420/1999, 2:298; Ibn ʿAbd al-Barr (d. 463/1070), *al-Kāfī fī Fiqh al-Madīnah al-Mālikī*, Beirut: Dār al-Kutub al-ʿIlmiyyah, 1418/1997, 582–583.
12. Muḥammad al-Sharbīnī al-Khaṭīb, *Mughnī al-Muḥtāj ilā Maʿrifat Maʿānī al-Minhāj*, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1414/1933, 4:180.
13. al-Ḥillī, *Mokhtasar-e Nafi'*, 365.
14. Ibid. Other details over the enforcement of punishment, including crucifixion, repentance, and so on under Shii law, do not differ significantly from the Sunni expositions of the same.
15. Ibn Ḥazm, *al-Muḥallā*, 11:306.
16. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "Ḥirābah," 17:157; Ibn Qudāmah, *al-Mughnī*, 8:287; Muntaṣir Saʿīd Ḥamudah, *al-Irhāb: Dirāsah Fiqhiyyah fī'l-Tashrīʿ al-Jināʾī al-Islāmī*, Alexandria, Egypt: Dār al-Jamīʿah al-Jadīdah li'l-Nashr, 2008, 74; al-Ḥillī, *Mokhtasar-e Nafi'*, 365.
17. al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:340–341; *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "Ḥirābah," 17:153, 158; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:657; al-Ḥillī, *Mokhtasar-e Nafi'*, 365.
18. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:91; *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 17:156–157.
19. Ibn Qudāmah (d. 620/1223) defined *ḥirābah* as "the act of openly holding people up in the desert with weapons in order to take their money" (*al-Mughnī*, Beirut: Dār al-Kutub al-ʿIlmiyyah, n.d., 10:315).
20. Ibn Qudāmah, *al-Mughnī*, 10:303.
21. Riḍā, *Tafsīr al-Manār*, 6:94.

22. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "Ḥirābah," 17:156.
23. al-Qurṭubī, *Bidāyah*, 2:341; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:658–659.
24. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:645; al-Ḥillī, *Mokhtasar-e Nafi'*, 365. Al-Ḥillī further mentions that a normal burial ceremony should be accorded to the deceased person after three days of crucifixion.
25. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:95; *al-Mawsūʿah al-Fiqhiyyah*, 17:162; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:658–659.
26. Ibn Qudāmah, *al-Mughnī*, 10:309; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:657.
27. al-Qurṭubī, *Bidāyat*, 2:342–343; Peters, *Crime and Punishment*, 59. See also ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:658–661.
28. Known as حشاشين, *Ḥashāshīn* (from *Assasiyyun*: "those faithful to the foundation"), is the name used to refer to the medieval Nizari Ismailis. Often characterised as a secret order led by a mysterious "Old Man of the Mountain," the Nizārī Ismāʿīlīs were an Islamic sect that was formed in the late eleventh century due to a split within Ismailism. The Nizārīs posed a military threat to Sunni Saljūq authority within their territories by capturing and inhabiting many unconnected mountain fortresses throughout Persia (and later also Syria) under the leadership of Ḥassan Ṣabbāh (who is typically regarded as the founder of the Assassins), therefore founding the so-called Nizārī Ismāʿīlī state with Alamut Castle as its headquarters. See, for details, https:// enc.wikipedia.org/ wiki/ Assassins. See also Asaf A. Fyzee, *Outlines of Muhammadan Law*, 2nd imp., New Delhi: Oxford University Press, 1999, 39–43.
29. Murad Wilfred Hofmann, "Fanaticism, Extremism and Terrorism and Islam's Position towards these Phenomena," conference paper presented at the international conference in Amman on "True Islam and Its Role in Modern Society," organised by the Aal al-Bayt Institute for Islamic Thought, 4–6 July 2005, 2.
30. Maḥmūd Shaltūt, *al-Islām: ʿAqīdah wa-Sharīʿah*, 328; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:446; Zuḥaylī, *Ḥuqūq al-Insān*, 144.
31. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:447.
32. Cf. Jamāl al-Dīn Abū 'l-Faraj ʿAbd al-Raḥmān Ibn al-Jawzī, *Zād al-Masīr fī ʿIlm al-Tafsīr*, Damascus: Dār Ibn Ḥazm li'l-Ṭabaʿah wa'l-Nashr wa'l-Tawzīʿ, 202, 2:61–62; see also al-ʿIbadī, *Min al-Adab wa'l-Akhlāq*, 164–165.
33. http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/21-jihad-classical-islamic-perspective.html?start=15 (accessed 21 May 2017).
34. al-Tabrīzī, *Mishkāt al-Maṣābīḥ*, vol. 2, hadith no. 3453.
35. al-Bukhārī, *Ṣaḥīḥ al-Bukhārī, Kitāb al-Adab, bāb mā yunha ʿanhu min al-sibāb*, hadith no. 6105.
36. https://sunnah.com/bukhari/64/242.
37. As quoted by Benjamin T. Acosta, "The Suicide Bomber as Sunni-Shi'i Hybrid," *Middle East Quarterly* (Summer 2010), 13–20. See also www.meforum.org/1003/ the-religious-foundations-of-suicide-bombings) (accessed 4 August 2017).

38. For details on suicide bombing, see Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, Cambridge: Islamic Texts Society, 2008, 29–35.
39. Robert A. Pape, *New York Times*, 22 September 2003, as quoted in Imam Feisal Abdul Rauf, *What Is Right with Islam Is What Is Right with America*, New York: Harper Collins, 2005, 146.
40. Nadirsyah Hosen, "Law, Religion and Security," in Silvio Ferrari, ed., *Routledge Handbook of Law and Religion*, Abingdon, UK and New York, 2015, 337.
41. Hoffman and Cronin are both quoted in Hosen, "Law, Religion and Security," 337–338.
42. Cf. Kent Roach, "The Case for Defining Terrorism with Restraint and without Reference to Political and Religious Motives," in A. Lynch et al., eds., *Law and Liberty in the War on Terror*, Sydney: Federation Press, 2007, 39–48 at 41.
43. Nikkie R. Keddie, "The Revolt of Islam from 1700 to 1993," in Bryan S. Turner, ed., *Islam: Critical Concepts in Sociology*, Oxford: Routledge, 2003, 2:89.
44. http://www.nieuwwij.nl/english/karen-armstrong-islam-violent-christianity/ (accessed 18 March 2015). Armstrong was interviewed by Lisette Thooft.
45. Paul Hedges, "Need for Global Solidarity with Muslims," *New Straits Times* (Kuala Lumpur), 29 April 2016, 17.
46. Saleena Saleem, "It's More Politics Than Religion," *New Straits Times* (Kuala Lumpur), 24 March 2016, 17.
47. Fareed Zakaria, "Radicals before They Were Religious," *New Straits Times* (Kuala Lumpur), 2 April 2016, 17.
48. Ibid.
49. Azhari Karim, "Dealing with Different Types of 'Terrorists,'" *New Straits Times* (Kuala Lumpur), 19 July 2016, 15.
50. Ibid.
51. "Malala urges Muslim unity," *New Straits Times* (Kuala Lumpur), 20 October 2016, 25.
52. Paul Hedges, "Need for Global Solidarity with Muslims," *New Straits Times* (Kuala Lumpur), 29 April 2016, 17.
53. Peter Apps, "Is Europe Overreacting to Terror?" *New Straits Times* (Kuala Lumpur), 3 September 2016, 15.
54. For details, see Ghazi b. Muhammad, Ibrahim Kalin, and Mohammad Hashim Kamali, eds., *War and Peace in Islam: The Uses and Abuses of Jihad*, Cambridge: Islamic Texts Society, 2013, Introduction by Kamali at xv.
55. As quoted in Kamali, *The Right to Life*, 34.
56. www.utusan.com.my/utusan/content.asp?y=2003&dt=1111&pub=utusan_Express.
57. Shaykh Maḥmūd Shaltūt, *Warfare in the Qur'an*, trans. Joel Howard, in Ghazi et al., eds., *War and Peace in Islam*, 43ff.

58. http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/21-jihad-classical-islamic-perspective.html?start=15 (accessed 21 May 2017).
59. Shaykh Muḥammad Sayyid Ṭanṭāwī as quoted by Anicee Van Engeland Nourai, "The Challenge of Fragmentation of International Humanitarian Law," in M. Cheriff Bassiouni, ed., *Jihad and Its Challenges*, The Hague: Hague Academic Press, 2010, 147.
60. As quoted in Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity*, New York: HarperCollins, 2004, 263.
61. Quoted in Nourai, "The Challenge of Fragmentation," 148.
62. http://www.npr.org/s.php?sId=4775588&m=1 (accessed 24 May 2017). See also "US Muslim Scholars to Forbid Terrorism" http://www.washingtonpost.com/wp-dyn/content/article/2005/07/27/AR2005072702082. html.
63. It has rightly been pointed out by Donald Neff that, without anticipating it, and certainly without wanting it, the policy of Israel in Lebanon "created...its own worst enemies"—the Hezbollah and (later and only indirectly) Hamas movements. See www.wrmea.com/archives/november02/0211020.html (accessed 21 May 2017).
64. Amal Saad Ghorayeb, *Hizbu'llah: Politics and Religion*, London: Pluto Press, 2002, 67. Casualty levels fluctuate wildly, but average around twelve deaths per suicide attack. The majority of suicide attacks originate from al-Qaeda and are carried out by zealous recruits from all over the Muslim world who have been flooding into Iraq. Other organisations that have also carried out suicide attacks are the Salafi-jihadi umbrella group Jaysh Ansar al-Sunnah (JAS) and the Shii cleric Muqtadā al-Ṣadr's Mahdī Army. See also A. B. Atwan, *The Secret History of al-Qa'ida*, London: Saqi Books, 2006, 100.
65. See Saad Ghorayeb, *Hizbu'llah*; Judith Palmer Harik, *Hezbollah: The Changing Force of Terrorism*, London and New York: I. B. Tauris, 2004, 65, 70.
66. Muhammad Munir, "Suicide Attacks and Islamic Law," *International Review of the Red Cross* 2008, 90 (899): 71–89 at 73. See Munir's article also at https://www.icrc.org/eng/assets/files/other/irrc-869_ munir.pdf (accessed 21 May 2017).
67. Cf. Farish Noor, "Radicalism's Pool of Support," *New Straits Times* (Kuala Lumpur), 25 August 2014, 12.
68. Amnesty International, *Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq*, London: Amnesty International, 2014.
69. Mark L. Winer, "Fundamentalists vs. Moderates: The War within Judaism," *Arches Quarterly* (2012) 5(9): 117.
70. Scott Thompson, "Liberty's 9/11," *New Straits Times* (Kuala Lumpur), 14 January 2015, 17.
71. Muḥammad b. ʿAlī al-Shawkānī, *Fatḥ al-Qadīr*, Damascus: Dār al-Kalam al-Ṭayyib, n.d., 2:39.
72. See for details Ḥasan al-Khaṭṭāf, "Mafhum al-ḥirābah wa-ḍawābiṭuha: Dirāsah bayn al-nāṣṣ al-Qurʾānī wa'l-turāth al-fiqhī," in *Islāmiyyat al-Maʿrifah: Majallat al-Fikr al-Islāmī al-Muʿāṣir*, Herndon, VA (1436/2015), 21:11 and 42.

73. Riḍā, *Tafsīr al-Manar*, 6:93.
74. Ḥasan al-Khaṭṭāf, "Mafhum al-ḥirābah wa-ḍawābiṭuha," 12.

CHAPTER VIII

1. This is so notwithstanding the fact that apostasy appears in a large number (about twenty-one) verses of the Qur'an.
2. Cf. Kamali, *Freedom of Expression in Islam*, 96.
3. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, 271, hadith no. 1023.
4. Cf. el-Awa, *Punishment*, 52.
5. al-Bukhārī, *Jawāhir Ṣaḥīḥ al-Bukhārī*, 150, hadith no. 229; and al-Nasāʾī, *Sunan, Kitāb al-Bayʿah, Bāb Istiqalāt al-Bayʿah*, hadith no. 4185. See also https://sunnah.com/nasai/39/37.
6. Abū Zahrah, *al-ʿUqūbah*, 165, discusses this hadith and also the Ḥanafī views concerning it in some detail.
7. Muḥammad b. ʿAlī al-Shawkānī, *Nayl al-Awṭār Sharḥ Muntaqā al-Akhbār*, Cairo: Muṣṭafā al-Bābī al-Ḥalabī, n.d., 7:218–219.
8. See for details Abū Zahrah, *al-ʿUqūbah*, 166.
9. Sufyān al-Thawrī's two works on hadith are *al-Jāmiʿ al-Ṣaghīr*, and *al-Jāmiʿ al-Kabīr*.
10. Ibn Taymiyyah, *al-Ṣārim al-Maslūl ʿalā Shatīm al-Rasūl*, ed. Muḥyī al-Dīn ʿAbd al-Ḥamīd, Beirut: Dār al-Kitāb, 1398/1978, 321; al-Shawkānī, *Nayl al-Awṭār*, 7:230.
11. See Abū Zahrah, *al-ʿUqūbah*, 167.
12. Ibn Taymiyyah, *al-Ṣārim al-Maslūl*, 318; ʿAbd al-Wahhāb al-Shaʿrānī, *Kitāb al-Mizān*, Cairo: Maṭbaʿah al-Ḥusayniyyah, 1329/1911, 2:134.
13. al-Shaʿrānī, *Kitāb al-Mizān*, 2:152.
14. al-Sarakhsī, *al-Mabsūṭ*, 10:110.
15. al-ʿIlī, *al-Ḥurriyyat al-ʿĀmmah*, 426; Badawī, *Daʿāʾim al-Ḥukm*, 166.
16. Shaltūt, *al-Islām, ʿAqīdah wa-Sharīʿah*, 292–293.
17. Ibid.
18. Ṣubḥī Muḥmaṣṣānī, *Arkān Ḥuqūq al-Insān*, Beirut: Dār al-ʿIlm li-l'Malayīn, 1979, 123–124; el-Awa, *Punishment*, 55.
19. Mutahhari, "Islam and the Freedom of Thought," *al-Tawḥīd*, 154.
20. Mahmud Zuhdi Abdul Majid, "Rational Approach to Pursuit of Islamic Order," *New Straits Times* (Kuala Lumpur), 20 July 1994, 12.
21. Cf. Mohammad Hashim Kamali, *Freedom of Expression in Islam*, Cambridge: Islamic Texts Society, 1997, chapter on Blasphemy, 212–250.

CHAPTER IX

1. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1256; al-Ḥillī, *Mokhtasar-e Nafi'*, 358. This is also how *qadhf* is defined in the Hudud Bill of Kelantan (clause 12).

2. al-Māwardī, *The Ordinances of Government: A Translation of al-Ahkām al-Sultāniyyah wa'l-Wilāyāt al-Dīniyyah*, trans. Wafaa H. Wahba, Reading, UK: Center for Muslim Contribution to Civilization, 1996, 251; al-Ḥillī, *Mokhtasar-e Nafi'*, 359.
3. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1256; al-Ḥillī, *Mokhtasar-e Nafi'*, 359.
4. See for details Martin Lings, *Muhammad: His Life Based on the Earliest Sources*, Cambridge: Islamic Texts Society, reprint 2007, 241.
5. Ibid., 246.
6. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:455, 462.
7. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:44; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:471.
8. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 463 [[what volume? or this should be ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:463?]]; al-Ḥillī, *Mokhtasar-e Nafi'*, 259.
9. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:488; al-Ḥillī, *Mokhtasar-e Nafi'*, 359.
10. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:489.
11. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:465; al-Ḥillī, *Mokhtasar-e Nafi'*, 359.
12. al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:330; *al-Mawsūʿah al-Fiqhiyyah*, "Qadhf," 33:20–21; al-Ḥillī, *Mokhtasar-e Nafi'*, 358.
13. Cf. *al-Mawsūʿah al-Fiqhiyyah*, vol. 33 under "Qadhf" at 14; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:480.
14. *al-Mawsūʿah al-Fiqhiyyah*, "Qadhf," vol. 33, 15; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:476–477; al-Ḥillī, *Mokhtasar-e Nafi'*, 359.
15. *al-Mawsūʿah al-Fiqhiyyah*, 33:16; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:473.
16. *al-Mawsūʿah al-Fiqhiyyah*, 33:20; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:482.
17. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 1328/1910, 12:62; Ibn Qudāmah al-Maqdisī, *al-Mughnī*, Riyadh: Maktabah al-Riyadh al-Ḥadīthah, 1401/1981, 8:217; el-Awa, *Punishment*, 22; al-Ḥillī, *Mokhtasar-e Nafi'*, 359–360; Peters, *Crime and Punishment*, 54.
18. al-Qurṭubī, *Bidāyat al-Mujtahid*, 2:331; Abū Zahrah, *al-ʿUqūbah*, 319–320.

CHAPTER X

1. Cf. al-ʿAwā, *al-Fiqh al-Islāmī*, 150.
2. *Ṣaḥīḥ al-Bukhārī*, 8:507, hadith no. 770; el-Awa, *Punishment*, 48.
3. Abū 'l-Walīd Muḥammad Ibn Rushd al-Qurṭubī (known as Ibn Rushd al-Ḥafīd), *Bidāyat al-Mujtahid wa-Nihāyat al-Muqtaṣid*, Lahore: Faran Academy, n.d., 2:333.
4. Ibid., 2:332; al-Ḥillī, *Mokhtasar-e Nafi'*, 361; al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1157–1158. The third, or preferably fourth, instance of drinking under both Shii and Sunni laws is punishable by death.
5. The Hudud Bill of Kelantan in Malaysia 1993 identified *shurb* as a *ḥadd* offence, which is punishable with "whipping of not more than eighty lashes but not less than forty lashes" (clause 22). What is of interest to note here is that the Kelantan Bill adopted a variable punishment of forty to eighty lashes for *shurb*, which is a

tacit recognition, perhaps, that *shurb* does not carry a fixed punishment, which is typical of the other *ḥudūd* offences.

6. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:500.
7. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1167.
8. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:507.
9. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1167.
10. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:505; al-Ḥillī, *Mokhtasar-e nafi'*, 360.
11. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾīʿ*, 5:112, 118; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:501; al-Ḥillī, *Mokhtasar-e Nafi'*, 360.
12. See for a discussion of the comparative views of the *madhāhib*, ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:502–503.
13. Ibid., 2:506.
14. Ibid., 2:504.
15. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾīʿ*, 5:118; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:504.
16. Abū Dāwūd, *Sunan Abū Dāwūd*, hadith no. 4476. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:506. For a discussion, see also al-ʿAwā, *al-Fiqh al-Islāmī*, 153.
17. Cf. Bahnasī, *al-ʿUqūbah*, 25; el-Awa, *Punishment*, 48.
18. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1157.
19. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾīʿ*, 7:50; al-Qurṭubī, *Bidāyah*, 2:333; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:510.
20. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 513.
21. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1161–1162.
22. Ibid., 1162.
23. Ibid., 1163. This should serve as a stern reminder to people like the Taliban of Afghanistan, at least those who are involved in terrorist activities, and others of the like who are rumoured to be earning much of their income through the nefarious opium trade. This is commonly known in Afghanistan. Also known widely is the fact that terrorist groups exploit the mineral resources of Afghanistan in the mountains, away from government control, without paying any share to the public treasury. They are also mostly heavily armed and dangerous. This surely combines aggressive and lawless behavior with transgressions that involve misappropriation of public assets and devouring wrongfully what belongs to the people of Afghanistan—and then also spending the proceeds on terrorist activities and bloodshed of innocent people.
24. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1164. In saying this, al-Jazīrī also cites in support a quotation from *Zād al-Maʿād fī Huda Khayr al-ʿIbād* by Ibn Qayyim al-Jawziyyah.
25. This is not an exaggeration, bearing in mind that well over one million (sometimes reportedly over two million) people, mostly young unemployed youth in Afghanistan, are addicted to opium and other drugs, and fill the parks and side streets of Kabul and other cities. This situation presents pressing religious

issues that demand adequate responses. It is an ugly epiphenomenon also for the spread of terrorism. Since 9/11, war and insecurity in the country has sapped the meagre resources of Afghanistan and the country is unable to take care of evils such as the drug problem. If the Taliban and other Muslims who are involved and directly or indirectly support such activities are not troubled by this, one wonders if their claims to religiosity and championship of shariah are really little more than empty clichés.

26. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1163.

CHAPTER XI

1. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1159.
2. The hadith is narrated by al-Bukhārī, Abū Dāwūd, and Imam Aḥmad Ibn Ḥanbal. See also, on the exercise of restraint in the enforcement of *ḥudūd* and *qiṣāṣ* punishments Ayatollah al-Shirāzī, *al-Fiqh: Mawsūʿah Istidlāliyyah fī'l-Fiqh al-Islāmī*, 2:44, and 47. See also al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1175.
3. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1176. See also *al-Mawsūʿah al-Fiqhiyyah*, 15:246 (under *jald*); al-Ḥillī, *Mokhtasar-e Nafi'*, 354.
4. Cf. *al-Mawsūʿah al-Fiqhiyyah,* 15:247. See also Peters, *Crime and Punishment*, 35.
5. ʿAwdah, *al-Tashrīʿ al-Jināʾī,* 2:508.
6. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "Ḥudūd," 17:132.
7. Peters, *Crime and Punishment*, 54.
8. Ibid., 55.
9. The hadith verified and narrated by Ibn Abī Shaybah is quoted in al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1167.
10. al-Ḥillī, *Mokhtasar-e Nafi'*, 354.
11. Abū Dāwūd, *Sunan Abū Dāwūd*, 2:280. Abū Zahrah, *al-ʿUqūbah*, 303. See also https://sunnah.com/urn/2015020 (accessed 17 January 2017).
12. See, for details, Kamali, *Freedom of Expression,* 233.
13. Ibid., 235.
14. Ibid., 219; al-Khammāsī, *al-Ḍarūrah,* 201.
15. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:62.
16. Abū Zahrah, *al-ʿUqūbah*, 215–216; see also al-Khammāsī, *al-Ḍarūrah*, 201.
17. Abū Zahrah, *al-ʿUqūbah*, 306.
18. Ibid., 215–216.
19. Ibid., 218. Abū Zahrah refers in support of his own views to *Fatḥ al-Qadīr* by the Ḥanafī scholar Kamāl Ibn al-Humām.
20. Ibid.
21. See, for details, Abū Zahrah, *al-ʿUqūbah*, 219.
22. Cf. Jonathan A. C. Brown, "Stoning and Handcutting: Understanding Hudud and the Shariah in Islam," https://yaqeeninstitute.org/en/jonathan-brown/stoning-and-hand-cutting-understanding-the-ḥudūd-and-the-shariah-in-islam/

(accessed 30 June 2017). See also Fariba Zarinebaf-Shahr, "Women in the Public Eye in Eighteenth-Century Istanbul," 302–304.

23. Anne-Marie Cusac, *Cruel and Unusual: The Culture of Punishment in America*, New Haven: Yale University Press, 2009, 21–22; John Langbein, "The Historical Origins of the Sanction of Imprisonment for Serious Crimes," *Journal of Legal Studies* 5, no. 1 (1976): 36.
24. The Ottoman experience in this regard seems to have been replicated in Afghanistan's current Penal Code (1976), which is also entirely based on *taʿzīr* (see for details on this the discussion on Afghanistan in part three).
25. See for details Ahmed Akgunduz, *Introduction to Islamic Law*, Rotterdam: IUR Press, 2010, 432.
26. Jonathan Brown, "Stoning and Handcutting," https://yaqeeninstitute.org/en/jonathan-brown/stoning-and-hand-cutting-understanding-the-ḥudūd-and-the-shariah-in-islam/ (accessed 30 June 2017). This manner of classification has been retained in the criminal codes of Egypt and Afghanistan. The triple classification (*jināyah, janḥah*, and *qabāḥah*) thus subsumes basically all crimes, all of which have also been subsumed under *taʿzīr*.

CHAPTER XII

1. See Fatḥī Bahnasī, *al-ʿUqūbah*, 18.
2. Aḥmad Taqī al-Dīn b. Taymiyyah, *al-Siyāsah al-Sharʿiyyah fī Iṣlāḥ al-Raʿy wa'l-Raʿiyyah*, Beirut: Dār al-Kutub al-ʿArabiyyah, 1966, 98; also quoted in Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī*, 4:285.
3. Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī*, 4:285.
4. A subtle difference is also recognised between *ʿiqāb* and *ʿadhāb* in that *ʿiqāb* refers to a punishment justly deserved, whereas *ʿadhāb* is torture that may be disproportionate to the conduct for which it is inflicted. See for details *al-Mawsūʿah al-Fiqhiyyah*, entry on "*ʿUqūbah*," 4:269.
5. J. W. Salmond, *Salmond on Jurisprudence*, 11th ed., London: Sweet & Maxwell, 1957, 115.
6. Cf. Muhammad Iqbal Siddiqi, *The Penal Law of Islam*, 2nd ed., Lahore: Sh Muhammad Ashraf, 1985, 9.
7. Cf. Peters, *Crime and Punishment*, 53.
8. Ibid., 27–28.
9. See for details al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1212–1213.
10. Hadith quoted al-Khaṭīb by al-Tabrīzī, *Mishkāt*, vol. 2, hadith 3626, *Kitāb al-Ḥudūd, Bāb mā lā yad'a ʿalā al-ḥudūd*, Egypt: al-Maktabah al-Tawfīqiyyah, n.d., 293: من اصاب ذنباً أقيم عليه حد ذلك الذنب فهو كفارته "Whoever commits a crime and is punished for it, this will be its expiation."
11. See https://sunnah.com/nasai/47/18 (accessed 18 March 2017).
12. Bahnasī, *al-ʿUqūbah*, 14–15.

13. Ibid., 16.
14. See for details Bahnasī, *al-ʿUqūbah*, 15–16.
15. Cf. Mohammad Shabbir, *Outlines of Criminal Law and Justice in Islam*, Petaling Jaya, Malaysia: International Law Book Services, 2003, 24f.
16. Qur'an, al-Nahl, 16:126: "If you punish, then punish with the like of that with which you were afflicted"; and Qur'an, al-Baqarah, 2:194: "And one who transgresses against you, then transgress against him in the like manner as he transgressed you."
17. Cf. al-Māʾidah, 5:33, 38; Yūnus, 10:27; al-Shūrā, 42:40.
18. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:636; el-Awa, *Punishment*, 26.
19. al-Māwardī, *al-Aḥkām al-Sulṭāniayyah*, 220.
20. *ʿAqīlah* refers to group responsibility, usually of male agnatic relatives or the clan of the offender, for the payment of *diya* when the offender himself is unable to pay. *Qasamah* refers to cases of homicide, especially when a dead body is found in a locality without any traces of the killer. The rules of *qasamah* hold up to fifty persons of the nearest residential groups responsible for the consequences.
21. al-Māwardī, *al-Aḥkām al-Sulṭāniyyah*, 205.
22. ʿĀlāʾ al-Dīn ʿAlī b. Muḥammad al-Dimashqī al-Ḥanbalī, *al-Ikhtiyārat al-Fiqhiyyah li-Shaykh al-Islām Ibn Taymiyyah*, ed. Shaykh al-ʿUthaymīn, [[Place?]] Dār al-ʿAsīmah li'l-Nashr wa'l-Tawzīʿ, 171, also quoted by Tawfīq al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:12.
23. Ibid. [[to al-Ḥanbalī or al-Shāwī? Write out this source.]]
24. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:192.
25. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:30; see also ʿAlī Manṣūr, *Niẓām al-Tajrīm*, 314.

CHAPTER XIII

1. al-Māwardī, *al-Aḥkām al-Sulṭāniyyah*, 236.
2. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "*Taʿzīr*," 12:254–255.
3. The Prophet, pbuh, is reported to have imposed seclusion (*iʿtizāl*) as a punishment on three of his companions who did not participate in the battle of Tābūk. They were denied the courtesy of *salām* (greeting), and a social boycott was imposed on them until a revelation came with respect to the acceptance of their penance. For details see Ibn Taymiyyah, *al Siyāsah*, 121.
4. This would be 40 lashes, or 80 for a free man, depending on which one of these constitutes the *ḥadd* of *shurb*, as there is some disagreement on this. Cf. Mohamed S. el-Awa, "Taʿzīr in the Islamic Penal System," *Journal of Islamic and Comparative Law 6* (1976), 51.
5. Ibid.
6. *al-Mawsūʿah al-Fiqhiyyah*, 12:267; see also al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1355.
7. Abdullah Yusuf Ali, *The Holy Qur'an, Text Translation and Commentary*, n4581.
8. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:777, 559–560.

9. For full citations of the Qur'an verses and hadith in support of *taʿzīr* offences, see Anwarullah, *Criminal Law*, 211–229.
10. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "*Taʿzīr*," 12:257–259.
11. Tāj, *al-Siyāsah*, 76; al Qarāfī, *al Furūq*, 3:266.
12. Ibid., 71.
13. *Taḥlīl* is an intervening marriage that legalises the marriage of a woman who has been divorced by triple *ṭalāq* to her former husband again.
14. Tāj, *al-Siyāsah*, 71–72.
15. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:510–511; Anwarullah, *The Criminal Law of Islam*, 3rd printing, Kuala Lumpur: A. S. Nordeen, 238.
16. See for further details on the limitations of *taʿzīr*: Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam*, Cambridge: Islamic Texts Society, 2008, 96–97. See for details on *Siyāsah Sharʿiyyah*, Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam*, Cambridge: Islamic Text Society, 2000, 143–149.
17. Both al-Zaylāʿī and Ibn Farḥūn are quoted in *al-Mawsūʿah al-Fiqhiyyah*, "*Taʿzīr*," 12:256–257.
18. Cf. Peters, *Crime and Punishment*, 66.
19. Hadith recorded by both al-Bukhārī and Muslim; also quoted in *al-Mawsūʿah al-Fiqhiyyah*, "*Taʿzīr*," 12:264.
20. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "*Taʿzīr*," 12:254–255; al-Jazīrī, *al-Fiqh ʿalāʾl-Madhāhib*, 1354–1355.
21. See for details of the scholastic positions on the maximum lashes for *taʿzīr* in these various categories, *al-Mawsūʿah al-Fiqhiyyah*, "*Taʿzīr*," 12:265–268.
22. *al-Mawsūʿah al-Fiqhiyyah* (Kuwait), "*Taʿzīr*," 12;264.
23. This hadith appears in *Ṣaḥīḥ* Muslim, *Kitāb al-Imārah, Bāb Ḥukmī Man Farraqa Amr al-Muslimīn*, hadith no. 1852; as also quoted in *al-Mawsūʿah al-Fiqhiyyah*, 12:264.

CHAPTER XIV

1. See for details Mohammad Hashim Kamali, "Siyasah Shar'iyyah or the Policies of Islamic Government," *American Journal of Islamic Social Sciences* (*AJISS*) 6 (1989), 59–81.
2. The Egyptian Code of Organization and Procedure for Shariah Courts 1897 (Art. 31) provided that no claim of marriage, divorce, or acknowledgement thereof may be heard after the death of either party unless it is supported by valid documents.
3. Khallāf, *al-Siyāsah*, 14.
4. Ibid., 15–16.
5. Ibid., 3.
6. The *maqāṣid al-sharīʿah* includes the safety and protection of human life and intellect; a normal order in society; and protection of religion, private property, and family. For details on *maqāṣid* see Kamali, *Shari'ah Law*, chap. 6, 123–141 in the next note.

7. Tāj, *al-Siyāsah*, 28.
8. Cf. Mohamed S. el-Awa, "Taʿzīr in the Islamic Penal System," *Journal of Islamic and Comparative Law* 6 (1976), 56–57.
9. Hadith recorded in *Ṣaḥīḥ Muslim, Kitāb al-Birr wa'l-Ṣillah wa'l-Adab, Bāb Faḍl al-Rifq,* hadith no. 2594, on the authority of ʿĀ'ishah.
10. Both of these hadith appear in Ibn Taymiyyah, *al-Siyāsah,* 145.
11. Hadith recorded in *Ṣaḥīḥ Muslim*, book 32, hadith 7. See also Ibn Taymiyyah, *al-Siyāsah,* 145.
12. Ibn Taymiyyah, *al-Siyāsah,* 27.
13. Ibid., 28.
14. For details on *siyāsah* see also Mohammad Hashim Kamali, "Beyond the Shariʿah: An Analysis of Shariʿah-Oriented Policy (*Siyasah Sharʿiyyah*)," in *Shariʿah Law: An Introduction*, Oxford: Oneworld Publications, 2008, 225–246.
15. Ibn Qayyim al-Jawziyyah, *al-Ṭurūq al-ḥukmiyyah fī 'l Siyāsah al-Sharʿiyyah* (Cairo: al Muʾassissah al-ʿArabiyyah li'l-Ṭibāʿah, 1380/1961), 28.
16. Tāj, *al-Siyāsah*, 43.
17. Ibn Qayyim al-Jawziyyah, *al-Ṭurūq,* 28.
18. E.g., the Qur'an (Óli ʿImrān, 3:104 and 100; al-Tawbah, 12:71 and 124).
19. Cf. el-Awa, *Punishment,* 116.
20. Abū Isḥāq Ibrāhīm al-Shāṭibī, *al Muwāfaqāt fī Uṣūl al-Sharīʿah* (Cairo: Maktabah al-Tijāriyyah al-Kubrā), 2:7.
21. Ibrāhīm b. ʿAlī Ibn Farḥūn, *Tabṣirah al-Ḥukkām fī Uṣūl al-ʿAqīdah* (Cairo: al-Maṭbaʿah al-Bahiyyah, 1302), 2:106.
22. ʿAbd al-Wahhāb Khallāf, *al-Siyāsah al-Sharʿiyyah,* Cairo: al-Maktabah al-Salafiyyah, 1350/1931, 3.
23. Ibid., 4.
24. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:510; Peters, *Crime and Punishment*, 68.
25. Noel J. Coulson, "The State and Individual in Islamic Law," *International and Comparative Law Quarterly*, 6, 1956: 52.
26. Ibn Qayyim al-Jawziyyah, *al-Ṭurūq,* 16.
27. Ibn Qayyim al-Jawziyyah, *al-Ṭurūq,* 5.
28. Ibid., 17.

CHAPTER XV

1. See for details on *qiṣāṣ* Mohammad Hashim Kamali, *The Right to Life, Security, Prinvacuy and Ownership in Islam,* Cambridge: Islamic Texts Society, 2008, 12ff.
2. Abū Dāwūd, ed., *Sunan Abū Dāwūd, Kitāb al-Diyyāt, bāb al-nafs bi'l-nafs,* hadith 4494. See also Ibn Taymiyyah, *al-Siyāsah al-Sharʿiyyah*, 142.
3. Ibn Taymiyyah, *al-Siyāsah*, 156.
4. Cf. Aḥmad Fatḥī Bahnasī, *al-ʿUqūbah fī'l-Fiqh al-Islām*, 5th rev. ed., Beirut and Cairo: Dār al-Shuruq, 1403/1983, 66.

5. Ibid., 72–74.
6. Ibid., 15–16; see also al-Ḥillī, *Mokhtsar-e Nafi'*, 371.
7. Cf. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:122.
8. Yūsuf al-Qaraḍāwī, *al-Shaykh al-Ghazālī kama ʿArafṭuhu Riḥlata Nisf Qarn*, Cairo: Dār al-Wafā lil-Ṭibāʿah wa'l-Nashr wa'l-Tawzīʿ, 1997, 167.
9. Abū Dāwūd, *Muktaṣar Sunan Abī Dāwūd*, ed. Muṣṭafā al-Bughā, 643, hadith 4497.
10. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, 475, hadith no. 1790.
11. al-Bukhārī, *Ṣaḥīḥ al-Bukhārī, Kitāb al-Diyyāt, bāb man qutila lahu qatilun*, hadith 6880.
12. Abū Zahrah, *al-ʿUqūbah*, 475; al-Ḥillī, *Mokhtasar-e Nafi'*, 379.
13. Tabrīzī, *Mishkāt*, vol. 2, hadith 3477.
14. Ibn Taymiyyah, *al-Siyāsah al-Sharʿiyyah*, 141.
15. Cf. Bassiouni, *Islamic Criminal Justice*, 209; al-Ḥillī, *Mokhtasar-e Nafi'*, 379.
16. Bahnasī, *al-ʿUqūbah*, 75–78.
17. Ibid., 76.
18. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:251.
19. Bahnasī, *al-ʿUqūbah*, 78.
20. Ibid., 77.
21. Abū Zahrah, *al-ʿUqūbah*, 484.
22. Ibid., 483.
23. Bahnasī, *al-ʿUqūbah*, 77.
24. Fazlur Rahman, "Law and Ethics in Islam," in Richard G. Hovannisan, ed., *Ethics in Islam*, Malibu, CA: Undena Publications, 1983, 10.
25. See for details Abū Zahrah, *al-ʿUqūbah*, 455; see also Peters, *Crime and Punishment*, 45.
26. Abū Zahrah, *al-ʿUqūbah*, 457.
27. al-Ḥillī, *Mokhtasar-e Nafi'*, 378; Peters, *Crime and Punishment*, 46.
28. Abū Zahrah, *al-ʿUqūbah*, 487; al-Ḥillī, *Mokhtasar-e Nafi'*, 379.
29. See for details al-Zuḥaylī, *al-Fiqh al-Islāmī*, 4:2; 60f; Mohammad Ibn Ibrahim al-Hewesh, "Murder and Homicide in Islamic Criminal Law: Textual Foundations," in Tahir Mahmood, *Criminal Law in Islam and the Muslim World: A Comparative Perspective*, New Delhi: Institute of Objective Studies, 2012, 158; al-Ḥillī, *Mokhtasar-e Nafi'*, 371ff.
30. Abū Zahrah, *al-ʿUqūbah*, 485; al-Ḥillī, *Mokhtasar-e Nafi'*, 380.

CHAPTER XVI

1. Cf. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:135.
2. Cf. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:237; ʿAlī ʿAbd al-Wāḥid Wafī, *Ḥimāyat al-Islām*, Cairo: Dār Nahdah, 1979, 8. The intensified *diya*, like the normal *diya* for life, is 100 camels, which consists, however, of different types and age groups of camels;

Cf. Bassiouni, *Criminal Justice*, 203. Some Shii jurists, including Naṣr al-Dīn al-Ṭūsī and Shaykh Mufīd, also stipulate intensified blood money (*diya mughāllaẓah*) for killing in the vicinity of the Ḥarām (Bayt al-Ḥarām, in Mecca). Cf. al-Ḥillī, *Mokhtasar-e Nafi'*, 384.

3. *ʿAqīlah* has tribal origins: when the Prophet migrated to Medina, Medinan life was strongly tribal. Each tribe, whether Arab or Jewish, constituted an independent unit, had tribal chiefs, a meeting place for the deliberation of tribal affairs and entertainment, etc. Judging by the Abū Naḍīr Jews, each tribe possessed a treasury (*kanz*) containing contributions of the members of the tribe to be expended on all group expenditures, such as wars: "A sort of social insurance existed among the Arabs: if one of them committed some offence or other bringing about pecuniary compensation, especially that of a blood-money, it was the tribal group as a whole, and not the guilty individual, that was responsible for the payment." This also reinforced the members' responsibility to adhere to the tribal rules. Cf. Muhammad Hamidullah, *The Life and Work of the Prophet of Islam,* English trans. and ed. Mahmood Ahmad Ghazi, Islamabad: Islamic Research Institute, 1998, 1:142–143. See also al-Ḥillī, *Mokhtasar-e Nafi'*, 383–384.
4. Yūsuf al-Qaraḍāwī, *Dirāsah fī Fiqh Maqāṣid al-Sharīʿah: Bayn al-Maqāṣid al-Kulliyyah wa'l-Nuṣūṣ al-Juzʾiyyah,* 4th ed., Cairo: Dār al-Shurūq, 2012, 82.
5. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:135; Peters, *Crime and Punishment*, 50.
6. al-Qurṭubī, *Tafsīr al-Qurṭubī*, 1:255.
7. Ibn Qudāmah, *al-Mughnī*, 7:745; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:245 (S. 198); al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 1:308.
8. Abū Dāwūd, *Sunan*, ed. al-Bugha (hadith reported by ʿAbd Allāh b. ʿUmar), 652, hadith 4542. For quantitative details of *diya* under Shii law, which are about the same as under Sunni law, namely 100 camels or their equivalent in gold and silver, see Abū Zahrah, *al-ʿUqūbah*, 514; al-Ḥillī, *Mokhtasar-e Nafi'*, 383f.
9. Yūsuf al-Qaraḍāwī, *al-Shaykh al-Ghazālī*, 166. For Shii law, which holds that the woman's *diya* is half that of the man, see al-Ḥillī, *Mokhtasar-e Nafi'*, 384.
10. al-Qaraḍāwī, *Shaykh al-Ghazālī*, 384.
11. Abū Zahrah, *al-ʿUqūbah*, 515.
12. Ibid., 516.
13. The *diya* provision appears in a long verse of the Qur'an in reference to unintentional killing that shall be compensated by freeing of a slave and payment of blood money to the family of the deceased. If the killer is unable to pay, his expiation shall be fasting for two consecutive months (al-Nisāʾ, 4:92). There is no distinction anywhere in this passage, which is the principal verse on *diya*, between man or woman, Muslim or non-Mulim.
14. A long hadith text and the episode of a slain body that was found in Khaybar appears in al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:286; see also Wafī, *Ḥuqūq al-Insān*, 264.
15. Cf. Bassiouni, *Criminal Justice*, 205–207.

16. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:256; al-Khaṭīb, *Mughnī al-Muḥtāj*, 4:95; Maḥmūd Shaltūt, *al-Islām, ʿAqīdah wa-Sharīʿah*, Kuwait: Dār al-Qalam, 1963, 315; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:673ff.
17. Shaltūt, *al-Islām*, 316. Shaltūt refers to Ibn ʿĀbidīn's view in his *Ḥashiyah*, vol. 5, in *Kitāb al-Maʿāqill*.
18. Should the deceased's body be found between two or more villages, *qasamah* is applicable to the one that is physically closer to where the body is found. See for details Abū Dāwūd, *Mukhtaṣar Sunan Abī Dāwūd*, 647–649.
19. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:286; Wafī, *Ḥuqūq al-Insān*, 263. Al-Tirmidhī recorded another long hadith, that one Muhayyisah found ʿAbd Allāh b. Sahl's dead body and buried him. Then he went to the Prophet together with an elder companion and informed him of it. The Prophet ordered *qasamah*, which could not for some reason be carried out, and the Prophet in his capacity as head of state eventually paid the *diya* to ʿAbd al-Raḥmān b. Sahl, the deceased person's brother. See the hadith at https://sunnah.com/tirmidhi/16/39.
20. ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 1:777.
21. Cf. Aharon Layish, "Saudi Arabia Legal Reform as a Mechanism to Moderate Wahhabi Doctrine," *Journal of the American Oriental Society*, 1987, 282; see also Al-Ṣādiq al-Mahdī, *al-ʿUqubāt al-Shariʿyyah wa-Mawāqifah min al-Niẓām al-Ijtimaʿī al-Islāmī* [Islamic Punishment and Its Place in an Islamic Social Order], Cairo: Zahrāʾ li'l-ʿAlām al-ʿArabī, 1986, 92.
22. Akgunduz, *Introduction*, 291; Layish, "Saudi Arabia Legal Reform," 282.
23. Akgunduz, *Introduction to Islamic Law*, 291.
24. Peters, *Crime and Punishment*, 151.
25. Cf. Eugene Coran and Chibli Mallat, eds., *Yearbook of Islamic and Middle Eastern Law*, vol. 4, London: Kluwers Law International, 2000–2001, 276.
26. Both these cases appeared in 2001, 1 L.M. (*Law Majalla*), International Islamic University Malaysia, 215.
27. Ibid.
28. https://en.wikipedia.org/wiki/Islamic_criminal_jurisprudence (accessed 28 October 2016).
29. Cf. Peters, *Crime and Punishment*, 162.
30. Cf. Ahmad Ibrahim, *The Administration of Islamic Law in Malaysia*, Kuala Lumpur: Institute of Islamic Understanding Malaysia (IKIM), 2000, 637; Tanzilur Rahman, *Islamization of Pakisan Law: Surveying from Islamic Point of View*, Karachi: Hamdard Academy, 1978, 16.
31. Gul Hassan Khan vs. the Government of Pakistan, PLD 180 Peshawar 154.
32. Cf. Peters, *Crime and Punishment*, 159.
33. See for details Tahir Mahmood, "Criminal Procedure at the Sharīʿah Law," in Tahir Mahmood, ed., *Criminal Law in Islam and the Muslim World: A Comparative Perspective*, Delhi: Institute of Objective Studies, 1996, 320f.
34. See for details Peters, *Crime and Punishment*, 172–173.

XVII

1. ʿAbd Allāh Ibn Sulaymān al-Jarḥazī, *Kitāb al-Mawāhib al-Sunniyyah ʿalā Sharḥ al-Fawāʾid al-Bahiyyah,* on the margin of *Jalāl al-Dīn al-Suyūṭī, al-Ashbāh wa'l-Nazāʾir*, Beirut: Dār al-Fikr, n.d., 189–190.
2. al-Zaylāʿī, *Naṣb al-Rāyah*, 2:333.
3. Cf. al-Majlis al-Aʿla li'l-Shuʾūn al-Islāmiyyah, "al-Ishtibāh fī'l-Ḥudūd," *Mawsūʿah Jamāl ʿAbd al-Nāsir*, Cairo: Maṭābiʿ al-Ihrām al-Tijāriyyah, 1973/1393, 10:74.
4. Cf. al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:42: *Mawsūʿah Jamāl*, 10:382ff; ʿAwdah, *al-Tashrīʿ al-Jināʾī*, 2:209.
5. al-Jazīrī, *al-Fiqh ʿalā'l-Madhāhib*, 1196. This also represents the Shii position. They give the same example, but add to it and extend it as follows: if a woman deliberately resembles herself to the wife of another, say in the dark of the night, in order to seduce the latter and *zinā* occurs as a result, she will be liable to the prescribed *ḥadd* but the man will not be (note: this example and the reverse of it, that a man mistook another woman for his wife, occur frequently in the early fiqh writings that precede the invention of electricity and other means of lighting). See also al-Ḥillī, *Mokhtasar-e Nafi'*, 351.
6. See for a fuller exposition of *shubha, al-Mawsūʿah al-Fiqhiyyah* (Kuwait), 1:26–32; see also al-Ḥillī, *Mokhtasar-e Nafi'*, 351.
7. Ibid., 30. [[Ibid. to *al-Mawsūʿah al-Fiqhiyyah* ? write this out.]]
8. See for details, al-Sarakhsī, *al-Mabsūṭ*, 9:58ff; Manṣūr, *Niẓām al-Tajrīm,* 184.
9. ʿAwdah, *al-Tashrīʿ al-Jināʾī,* 1:370.
10. Ibid., 2:214; Abū Zahrah, *al-ʿUqūbah,* 219–228.
11. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:27.
12. Mohamed S. el-Awa, "The Basics of Islamic Penal Legislation," in C. Bassiouni, ed., *The Islamic Criminal Justice System,* London: Oceana Publications, 1982, 146.

CHAPTER XVIII

1. Sayyid Abūl Aʿla Maududi, *The Islamic State and Constitution,* 8th printing, Lahore: Islamic Publication Ltd., 1983, 52.
2. Ibid., 54.
3. Ibid., 55.
4. el-Awa, *Punishment,* 136.
5. Ibid.
6. Ibid., 137.
7. Abū Yūsuf, *Kitāb al-Kharāj*, 163.
8. Bassiouni, *The Islamic Criminal Justice System,* 5.
9. Ibid., 5. This report and the saying of caliph ʿUmar also appear in Bahnasī, *al-ʿUqūbah,* 26.
10. al-Sarakhsī, *al-Mabsūṭ*, 9:141: Yūsuf al-Qaraḍāwī, *Sharīʿah al-Islāmiyyah Ṣāliḥah li'l-Taṭbīq fī Kull Zamān wa-Makān,* Cairo: Dār al-Ṣaḥwah, 1393/1973, 35.

11. Fazlur Rahman, "The Concept of *Hadd*," 237.
12. Abdullah H. H. al-Khalifah, "Religiosity in Islam as a Protective Mechanism against Criminal Temptation," *American Journal of Islamic Social Sciences,* 11, no. 1 (1194): 5.
13. Ibid., 8.
14. Mahmud Zuhdi Abdul Majid's remarks appeared in the *New Straits Times* report by Rozi Ali of the seminar entitled, "Rational Approach to Pursuit of Islamic Order," 20 July 1994, 12.
15. al-Qaraḍāwī, *Sharīʿah al-Islām*, 162.
16. Muḥammad al-Ghazālī, *Min Hunā Naʿlam,* Cairo: n.p., 1948, 5. Also discussed by Hamid Enayat, *Modern Islamic Political Thought,* London: Macmillan Press, 1989, 90.
17. Ibid., 30–31; Enayat, *Modern Islamic Political Thought*, 90.
18. Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀm,* Damascus: Dār al-Fikr, 1387/1968, 1:51.
19. Muṣṭafā Aḥmad al-Zarqā, *al-Madkhal al-Fiqhī al-ʿĀm: Ikhrāj Jadīd fī'l-Tartīb wa'l-Tabwīb wa'l Ziyādat*, 1st ed., Damascus: Dār al-Qalam, 1418/1991, 1:282.
20. Ibid., 1:284.
21. Ibid.
22. Ibid.
23. ʿAbd Allāh b. al-Mafuz Bin Bayyah, *Tanbih al-Waqīʿ ʿalā Taʾsīl Fiqh al-Waqīʿ* [Reading the Jurisprudence of Pragmatism into the Sources of Shariah], UAE: al-Majlis al-Waṭanī al-ʿĀm, 2014, 82–83. [[check title of highlighted book]]
24. Ibid., 85–86.
25. Ibid., 88–89.

CHAPTER XIX

1. The full text of the Kelantan Bill in its official English translation appears under Appendix A at the end of this volume.
2. *New Straits Times,* 25 November 1993, 8.
3. Ibid.
4. Ibid.
5. "Hudud Laws for Muslims Only," *News Straits Times* (Kuala Lumpur), 19 November 1993.
6. Rose Ismail, "Hudud Laws," *New Straits Times* (Kuala Lumpur), 10 July 1994, 12.
7. Linna Yong, "The Burden of Proof in Hudud," *The Star* (Kuala Lumpur), 22 November 1993, 18.
8. Salbiah Ahmad, "An Issue Paper of Zina and Rape under the Syariah Criminal Code (II) Bill 1993 (Kelantan)," presented to a forum at the Institute of Strategic and International Studies, 19 January 1993, 8. A summary of this paper was also reported in Mazian Nordin, *New Straits Times* (Kuala Lumpur), 19 October 1993.

9. Rose lsmail, "Hudud Law in Other Countries," paper presented to an ISIS (Institute of Strategic and International Studies) forum in Kuala Lumpur on 19 November 1993, 2. A summary of this paper also appeared in Yong, "The Burden of Proof in Hudud," 18.
10. Salbiah Ahmad, "An Issue Paper," 7.

CHAPTER XX

1. Shaila Khoshy and Mustafa Kamal Basri, "PAS: Hudud Good for Muslims," *The Star* (Kuala Lumpur), 9 July 2002, 4.
2. Mustafa Kamal, "Sultan Mizan Gives Consent to Hudud Law," *The Star* (Kuala Lumpur), 1 August 2002, Nation, 10.
3. "Women Unite: Oppose Hudud Laws, Says Shahrizat," *The Star* (Kuala Lumpur), 29 May 2002, Front page and 3.
4. Ibid., 3.
5. Ibid.
6. *The Star* (Kuala Lumpur), 30 May 2002, Nation, 2; *New Straits Times* (Kuala Lumpur), 31 May 2002, National, 4.
7. *New Straits Times* (Kuala Lumpur), 31 May 2002, National, 4.
8. *New Straits Times*, "PAS Hudud Laws: Keadilan Wants Rape Victims Treated Fairly," 31 May 2002, National, 4.
9. Ibid.
10. "Lo' Lo' Ghazali: Review, [but] Don't Oppose Hudud Bill," *The Star* (Kuala Lumpur), 30 May 2002, Nation, 2.
11. "Hadi: Many Do Not Understand the Bill," *New Straits Times* (Kuala Lumpur), National, 31 May 2002, 4.
12. "Women Leaders to Meet on Bill," *The Star* (Kuala Lumpur), 31 May 2002, 2.
13. Joceline Tan, "New Hands That May Reshape PAS," *The Star* (Kuala Lumpur), Focus, 16 June 2002, 23.
14. Ibid.
15. "Attorney General Will Get Draft Bill," *The Star* (Kuala Lumpur), 2 June 2002, Nation, 5.
16. "Hadi: Hudud Bill Will be Tabled," *The Star* (Kuala Lumpur), 17 June 2002, Nation, 2.
17. *The Star* (Kuala Lumpur), 19 June 2002, Nation, 2. See also *New Straits Times*, 19 June 2002, Front page.
18. *The Star* (Kuala Lumpur), July 10, 2002, Nation, 2, quoting both Rais Yatim and Abdullah Ahmad Badawi.
19. Lourdes Charles and Mustafa Kamal Basri, "Cops Won't Help Enforce Hudud Laws in Terengganu," *The Star* (Kuala Lumpur), 11 July 2002, Front Page.
20. Ahmad Ibrahim, *The Administration*, 639.
21. Ibid., 640.
22. Ibid., 639–640.

XXI

1. Cf. Mohammed Imam, "Islamic Criminal Law in Malaysia: Federal State Jurisdictional Conflict," [1004] *Current Law Journal* (March 1994), xxix.
2. Ibid., xxiv.
3. "Ex-FT Mufti: PAS Shows It Was Not Ready to Enforce Hudud," *New Straits Times* (Kuala Lumpur), 14 December 2002, Nation, 24.
4. Ibid.
5. According to Art. 76A of the Federal Constitution, Parliament may authorise the state legislature to make laws pertaining to matters that appear under the Federal List.
6. Kassim Ahmad, "Resolving the 'Hudud' Law Dilemma," *New Straits Times* (Kuala Lumpur), 4 December 1993, 13.
7. "MB: Federal Consent Needed to Enforce Hudud Law," *New Straits Times* (Kuala Lumpur), 11 July 1994, 9.
8. *The Star* (Kuala Lumpur), 26 July 1994, 2.
9. *New Straits Times* (Kuala Lumpur), 10 September 1994, 1–2.
10. *New Straits Times* (Kuala Lumpur), 2 October 1994, 6.
11. Ibid.
12. *New Straits Times* (Kuala Lumpur), 15 October 1994, 2.
13. "Karpal: Hudud Will Lead to Lawlessness," *New Straits Times* (Kuala Lumpur), 31 October 2011, 10.
14. Masami Mustaza, "Law Doesn't Allow for Hudud in States," *New Straits Times* (Kuala Lumpur), 30 October 2011, 29.
15. Shaila Khoshy, "Incest Victims Prefer Federal Law to Shariah," *Sunday Star* (Kuala Lumpur), 30 November 2003, Nation, 15.
16. Ibid. Zakaria, who is also Senior Federal Counsel, added that there was a technical committee under the Religious Affairs Department that was studying whether offences such as incest, which already exist in the penal code, should be excluded from the state shariah criminal offences laws.
17. Rose Ismail, "Hudud Laws," *New Straits Times* (Kuala Lumpur), 10 July 1994, 12.
18. K. Haridas, "Islamization of State and Society," in Norani Othman, ed., *Shariah Law and the Modern Nation State: A Malaysian Symposium,* Kuala Lumpur: Sisters in Islam, 1994, 99.
19. Ibid.
20. Koshy's interview with Wan Muttalib Embong, "PAS: Hudud Law Will Run Its Course," *The Star* (Kuala Lumpur), 18 August 2002, 26.

CHAPTER XXII

1. The 9th schedule of the federal constitution provides three lists: list 1 sets out matters within the exclusive jurisdiction of the federal parliament; list 2 states matters for which only the state legislature can make laws; and the third list (the

concurrent list) covers matters where both the state and federal legislatures can make laws. Only the federal parliament (list 2) can legislate on matters relating to criminal law and procedure.

2. Adie Suri Zulkefli and Jasmine Kaur, "PM: Hudud Not Rejected by Government," *New Straits Times* (Kuala Lumpur), 15 April 2014, 2.
3. "Kelantan Tables Hudud Amendments," *The Sun,* 19 March 2015, 2.
4. Sheridan Mahavera, "State Government Survey Finds 90% in Kelantan Want Hudud," 2 April 2015, htpp://www.themalaysiainsider.com/Malaysia/article/state-government-survey-finds-90-in-kelantan-want-ḥudūd (accessed 15 April 2015).
5. Ibid. The survey was conducted via text messages to more than 156,000 residents in 24 out of 45 state constituencies and the survey received only 9,654 replies, of which 8,940 were validated.
6. Elizabeth Zakariah, "Impossible to Enforce Hudud in Malaysia, says Law Minister," *The Malaysian Insider*, 24 March 2015, http://www.the malaysianinsider.com/malaysia/article/impossible-to-enforce-ḥudūd-in-malaysia-says-law-minister (accessed 15 April 2015).
7. Ibid.
8. Tun Abdul Hamid Mohamad, "Implementation of the Islamic Criminal Law (*hudud, qisas, ta'zir*) in Malaysia—Prospects and Challenges," keynote address delivered at a seminar on implementation of *ḥudūd* in Malaysia—history and the future, Putrajaya, 1 April 2015, 8 (Eng. trans. of original address in Bahasa Malaysia), complement of Tun Hamid to the present writer.
9. Tun Hamid's Speech, ibid., 10.
10. Ibid., 11.
11. Rozannea Latiff, "Dr. M: Pas 'Hudud Un-Islamic," *New Straits Times* (Kuala Lumpur), 5 April 2015, 16.
12. "Laws Must Be Fair, Infused with Justice," *New Straits Times* (Kuala Lumpur), 27 March 2015, 12. The Sultan of Perak made these remarks at the 20th Certificate in Legal Practice Convocation by Legal Profession Qualifying Board Malaysia in Kuala Lumpur.
13. Khairul Azwan Harun, "Why Act 355 Needs Amending?" *New Straits Times* (Kuala Lumpur), 21 September 2016, 15.
14. Ibid.
15. Ibid.
16. Abdul Hamid Mohamad, "Amendment of Act 355: The Real Effect," *New Straits Times* (Kuala Lumpur), 29 September 2016, 12. See also Fernando Fong, "Tun Abdul Hamid Mohammad: Combine Courts to Solve Conflict of Jurisdiction," *New Straits Times* (Kuala Lumpur), 9 December 2016.
17. Mohamed Azam Mohamed Adil, "Shariah Criminal Code (II) Enactment 1993 Amendment 2015: Can Kelantan Enforce Hudud?" *Islam and Civilisational Renewal*, Vol. 7, No. 4, 548–551.

18. Adrian Ali and Esther Landau, "Govt Won't Table Bill," *New Straits Times* (Kuala Lumpur), 30 March 2017, 6.
19. Annuar Musa, "Rejection of Tabling Done in Consensus," *New Straits Times* (Kuala Lumpur), 30 March 2017, 11.
20. "Public Caning in Kelantan for 4 Shariah Offences," *New Straits Times* (Kuala Lumpur), 13 July 2017 (Front page), quoting Daud Nassuruddin.
21. Sharifah Mahsinah Abdullah, "Public Caning to Start in Two Months," Kuala Lumpur: *New Straits Times*, 14 July 2017, 8.
22. Ibid.
23. Go Pei Pei and Zafira Anwar, "Zahid: Kelantan Has Right to Amend Law," Kuala Lumpur, *New Straits Times* (Kuala Lumpur), 14 July 2017, 8.
24. "Amendments Involve Only Venue of Punishment, Says Jamil Khir," *New Straits Times* (Kuala Lumpur), 16 July 2017, 7.
25. "Mufti: Public Caning a Reminder to the People," *New Straits Times* (Kuala Lumpur), 13 July 2017, 4.

CHAPTER XXIII

1. Peters, *Crime and Punishment*, 119.
2. Ibid., 189.
3. Ibid., 104–105.
4. Ibid., 107–109.
5. See, for details, Tun Abdul Hamid Mohamad (former Chief Justice of Malaysia), "In Search of a Suitable Model of Penal Code for Afghanistan," *Islam and Civilisational Renewal* 4, no. 2 (2013): 298.
6. Ibid., 299.
7. Ibid.
8. Mosques operated in most large cities within these territories, though the number decreased dramatically from 25,000 in 1917 to 500 in the 1970s. See "Islam in the Soviet Union," https://en.wikipedia.org/wiki/Islam_in_the_Soviet_Union (accessed 27 October 2017).
9. Cf. Nazif Shahrani, "Islam and Scientific Atheism in Post-Soviet Central Asia: Future Predicament," *Islamic Studies* (Special Issue on Central Asia), Islamabad: Islamic Research Institute, 1994, 146–147.
10. Islam Karimove as quoted in Shahrani, ibid., 144.
11. https://en.wikipedia.org/wiki/application_of_Islamic_law_by_country (accessed 15 October 2017). See also Riyaz Ahmad Sheikh, "Soviet and Post-Soviet Discourses on Islam: A Comparative Study of Uzbekistan," *Social Science Review* 2, no. 1 (June 2016): 36. See also Enayatollah Yazdani, "Globalization and the Role of Islam in the Post-Soviet Central Asia," *Alternatives: Turkish Journal of International Relations* 8, no. 2 (Summer 2009): 53.

12. Cf. Butti Sultan Butti Ali Al-Muhairi, "Islamisation and Modernisation within the UAE Penal Law: Shari'ah in the Modern Era," *Arab Law Quarterly* 11, no. 1 (1996): 34–49, 35, and 43.
13. Cf. Akgunduz, *Introduction*, 294; Peters, *Crime and Punishment*, 145.

CHAPTER XXIV

1. Bars and nightclubs are generally permitted businesses under the Regulation of the President of the Republic of Indonesia, Number 36 of 2010, 46, 70–71.
2. AFP Report, "Indonesia Cracks Down on Alcohol Sales," *The Sun* (Kuala Lumpur), 17 April 2015, 9.
3. Ibid.
4. Cf. Joseph Camilleri and Sven Schottmann, "Culture, Religion and the Southeast Asian State," in *Culture, Religion and Conflict in Muslim Southeast Asia: Negotiating Tense Pluralisms*, London: Routledge, 2013, 1–16.
5. There are questions on whether Islamic law could be considered "native" or "foreign" in Indonesia. Even in the times of Aceh sultanates, there are reports of gambling and alcohol drinking in Acehnese courts. See Tim Lindsey, "When Words Fail: Syariah Law in Indonesia: Revival, Reform or Transformation," in Penelope Nicholson and Sarah Bidulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Leiden: Brill-Nijhoff, 2008, 212.
6. It has not been clarified but it seems that the external factor in the picture might be a reference to the Indonesian military.
7. Tim Lindsey et al., *Examining Practice*, 212.
8. The official title in Indonesian is Qanun Aceh Nombor 6 Tahun 2014 tentang Huokum Jinayat (Aceh Regional Regulation No. 6, 2014 on Islamic criminal law).
9. See also http://themonsoonproject.org/2014/05/30/justified-injustice-sharia-law-in-aceh-indonesia/ (accessed 14 July 2015).
10. Retrieved from: http://www.benarnews.org/english/news/indonesian/Aceh-sharia-04292015183548.html (accessed 9 March 2017).
11. Retrieved from: http://www.ucanews.com/news/sharia-law-draws-rave-reviews-in-indonesias-aceh/73112 (accessed 9 March 2017).
12. N. Hasan, "A Look at Shariah in Aceh, 10 Years On," *Jakarta Globe*, 28 November 2011.
13. Ibid.
14. The present writer wishes to thank Dr. Hafas Furqani of Banda Aceh for this information. He is a scholar of shariah himself. Interestingly, his father, Dr. Soufyan Mohd Soleh, was the chief judge of the Shariah Court of Aceh (Personal conversation with the author, Banda Aceh, 29 April 2015).
15. Topo Santoso, "Implementation of Islamic Criminal Law in Indonesia: Ta'zir Punishment as a Solution?," *IIUMLJ*, vol. 19 (2011), 123–149. [[write out the journal name]]

16. Marsen S. Naga, "Logical Flaws in Aceh's 'Qanun Jinayat,'" *Jakarta Post*, 6 October 2014, http://www.thejakartapost.com/news/2014/10/06/logical-flaws-aceh-s-qanun-jinayat.html (accessed 1 October 2016).
17. Moch Nor Ichwan, "Alternative to Shariatism: Progressive Muslim Intellectuals, Feminists, Queers and Sufis in Contemporary Aceh," in *Regime Change, Democracy and Islam: The Case of Indonesia,* Final Report Islam Research Programme Jakarta, Leiden: Leiden University Institute for Area Studies, 2013. Most papers in the report are quite critical of shariah in Aceh.
18. See Husni Mubarak A. Latief, "Hukuman Rajam dalam Rancangan Qanun Jinayay Aceh," *Socio-Religio*, vol. 9, issue 3 (May 2010), 829f.
19. The nine chapters include such themes as general provisions, exemptions and excuses, compensation and rehabilitation, offences by children, transitional provisions, and concluding provisions.
20. Article 125 of the 2006 Law further elaborated the provisions for Muslims and stated that the Islamic religion, which consists of faith (*ʿaqīdah*), law (shariah), and morality (*akhlāq*), covers matters of worship (*ʿibādah*), family law (*aḥwal shakhṣiyyah*), civil law (*muʿāmalah*), criminal law (*jināyah*), adjudication (*qaḍā*), education (*tarbiyah*), propagation (*daʿwah*), dissemination (*shiʿār*), and the defence of Islam.
21. See aceh.tribunnews.com (accessed 10 October 2016).
22. See icjr.or.id; see also hukumonline.com (accessed 27 September 2016). In its rebuttal, the S/C also mentioned that the defendant had organised a Public Hearing, which involved all components of Aceh society. However, in the list of proofs supplied by the defendant, which include letters from DPRA and the Aceh governor, state attorney, police, the shariah court, and the interior minister, this Public Hearing is not mentioned at all. In the previous DPRA ratification of the *qanun jinayat* in 2009, the head of the DPRA committee responsible for the *qanun* formulation stated that the public, such as the ulama, civil society representatives, universities, and youth organizations were invited for a public hearing. However, no one attended. One wonders whether a similar situation took place in 2014. See Putusan nomor 60P/HUM/2015 [putusan.mahkamahagung.go.id] (accessed 5 October 2016).
23. Indonesia: Elderly Christian Woman Whipped under Sharia Law for Selling Alcohol, https://asiancorrespondent.com/2016/04/indonesia-elderly-christian-woman-whipped-in-public-for-selling-alcohol/ (accessed 24 April 2016).

CHAPTER XXV

1. AFP report, "Brunei to Introduce Shariah Penal Code," *News Straits Times* (Kuala Lumpur), 23 October 2013, 29.
2. Ibid.
3. https://www.facebook.com/BukanZombie/posts/207798052733306 (accessed 8 January 2015).

4. http://www.straitstimes.com/asia/se-asia/brunei-delays-introduction-of-tough-islamic-law (accessed 8 January 2015).
5. https://www.theguardian.com/world/2014/apr/30/sultan-brunei-sharia-penal-code-flogging-death-stoning (accessed 8 January 2015).
6. Ibid.
7. Abdul Hamid Mohamad, "Implementation of the Islamic Criminal Law (*hudud, qisas, ta'zir*) in Malaysia—Prospects and Challenges," Kuala Lumpur, 1 April 2015, 1. The present writer wishes to thank the learned author for a personal copy he sent me of the English translation of his original lecture in the Malay language.

CHAPTER XXVI

1. Akgunduz, *Introduction*, 290.
2. This court was originally created to deal with complaints against the government, but as of 2010 its jurisdiction had expanded over commercial and some criminal cases, such as bribery and forgery, and it acts as a court of appeal for a number of non-shariah government tribunals.
3. Akgunduz, *Introduction*, 291; Aharon Layish, "Saudi Arabia Legal Reform as a Mechanism to Moderate Wahhabi Doctrine," *Journal of the American Oriental Society*, vol. 107, issue 2 (1987), 280; "A Brief Overview of Saudi Arabian Legal System," http://www.nyulawglobal.org/globalex/Saudi_Arabia.html (accessed 13 April 2017).
4. Akgunduz, *Introduction*, 291–292.
5. Peters, *Crime and Punishment*, 148–149.
6. al-Shāwī, *al-Mawsūʿah al-ʿAṣriyyah*, 4:184.
7. Ibid., 4:150.
8. Jon Weinberg, "Sword of Justice? Beheadings Rise in Saudi Arabia," *Harvard International Review*, vol. 29, issue 4 (Winter 2008), http://www.freepatentsonline.com/article/Harvard-International-Review/177028385.html (accessed 29 May 2017).
9. "100 Beheadings, 6 Months: Why the Saudi Kingdom Is on an Execution Spree," http://www.thedailybeast.com/articles/2015/06/18/100-beheadings-6-months-why-the-saudi-kingdom-is-on-an-execution-spree.html (accessed 3 September 2015).
10. "Saudi Prince Executed for Murder," AFP report carried in *The Sun* (Kuala Lumpur), 20 October 2016, 11.
11. Ibid.
12. Weinberg, "Sword of Justice?.
13. Letter to Saudi Rights Body on Amputation Case, https://www.hrw.org/news/2011/12/16/letter-saudi-rights-body-amputation-case (accessed 3 September 2015).
14. See comment by Joseph E. Lowry, Associate Professor of Arabic and Islamic Studies at the University of Pennsylvania, at http://www.middleeasteye.net/

news/crime-and-punishment-islamic-state-vs-saudi-arabia-1588245666 (accessed 27 January 2017).

15. Ibid.

CHAPTER XXVII

1. See for details Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitution, Matrimonial Law and the Judiciary*, Leiden: E. J Brill, 1985, 4-7 and passim.
2. See for details Mohammad Hashim Kamali, *Afghanistan's Constitution Ten Years On: What Are the Issues?* Kabul: Afghanistan's Research and Evaluation Unit (AREU), 2014, 20f.
3. The substance of these provisions is also upheld in the Civil Code 1976 (Art. 2), however, with an added element, which provides that when no ruling is found in Ḥanafī fiqh pertaining to a case under adjudication, the court shall issue judgment in accordance with the general custom, provided that such custom does not contravene the fundamental principles of law and justice.

CHAPTER XXVIII

1. Rudolph Peters, "The Islamization of Criminal Law: A Comparative Analysis," *Die Welt des Islams, New Series*, vol. 34, issue 2 (Nov. 1994), 246–274, 256, http://www.jstor.org/stable/1570932 (accessed 20 May 2014).
2. See also Peters, *Crime and Punishment*, 166.
3. Peters, "The Islamization of Criminal Law," 257.
4. Ibid.
5. Peters, *Crime and Punishment*, 157.
6. Qur'an, al-Nūr, 24:2. See also Jones-Pauly, "Use of the Qur'an in Key Pakistani Court Decisions on Zina and Qadhf," *Arabica*, T. 47 (3), July 2000," 540.
7. PLD [1983], 255.
8. http://www.dawn.com/news/1110944 (accessed 29 May 2017).
9. Peters, "The Islamization of Criminal Law," 259.
10. Cf. Peters, *Crime and Punishment*, 159.
11. "*Hudood* Ordinances: Changes in Pakistan's Rape Laws (Slowly) Make Progress," http://www.patheos.com/blogs/altmuslim/2006/08/changes_in_pakistans_rape_laws_slowly_make_progress/ (accessed 4 August 2014).
12. "Legal Injustices—The *Zina Hudood* Ordinance," *Journal of International Women's Studies*, vol. 7, issue 2 (November 2005), 20.
13. Shaheen Sardar Ali, "Applying Islamic Criminal Justice in Plural Legal Systems Exploring Gender-Sensitive Judicial Responses to Hudood Laws in Pakistan," Paper for International Judicial Conference, Islamabad, Pakistan, 11–14 August 2006, 18 (accessed 4 August 2014).

14. http://www.pakistani.org/pakistan/legislation/hudood.html 8th August 2006 by Zahirjan Mohamed (accessed 4 August 2014).
15. Ibid.
16. Report by Dominic Kelly, http://www.independent.co.uk/news/world/politics/special-report-the-punishment-was-death-by-stoning-the-crime-having-a-mobile-phone-8846585.html (accessed 29 May 2017).

CHAPTER XXIX

1. Peters, "The Islamization of Criminal Law," 246–274, 260.
2. Peters, *Crime and Punishment*, 161. See also Maryam Hosseinkhah of Iran Human Rights Documentation Center, "The Execution of Women in Iranian Criminal Law: An Examination of the Impact of Gender on Laws Concerning Capital Punishment in the New Islamic Penal Code."
3. Report of the spokesman of the Judicial and Legal Commission of the Parliament (in Persian), http://dadazmoon.ir/?p=20 (accessed 27 December 2013).
4. Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), vol. 2 (2014), 24–38, http://www.ejimel.uzh.ch (accessed 20 January 2015).
5. Mohammad Ghaffari and Habibollah Najafi, "Inflation of Criminal Laws in Iran, Causes, and Consequences," *International Research Journal of Applied and Basic Sciences*, vol. 3, issue 7, 1360–1368 (2012), 1361, http://www.irjabs.com/files_site/paperlist/r_458_121110155810.pdf (accessed 24 May 2014).
6. Mohammad Hossein Nayyeri, *Research Paper Series:* New Islamic Panel Code of the Islamic Republic of Iran: An Overview, 2012, 16.
7. http://www.iranhrdc.org/english/publications/legal-commentary/1000000059-the-question-of-stoning-to-death-in-the-new-penal-code-of-the-iri.html (accessed 20 January 2015).
8. https://www.amnesty.org/en/countries/middle-east-and-north-africa/iran/report-iran/ (accessed 21 April 2017).
9. AFP report published in *The Star* (Kuala Lumpur), 30 December 2002, 36.
10. Peters, *Crime and Punishment*, 162.
11. See also Nayyeri, New Islamic Panel Code, 2012, 18.
12. al-Qaraḍāwī, *al-Shaykh al-Ghazālī*. See also Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam,* Cambridge: The Islamic Texts Society, 2008, 20–21.

CHAPTER XXX

1. Article 262 of the federal constitution of Nigeria elaborates as follows: (1) The Shariah Court of Appeal shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic

personal law, such as marriage, divorce, family relationships, guardianship of infants or of the mentally ill and infirm, *waqf*, and gifts.

2. Cf. Akgunduz, *Introduction*, 300.
3. Elizabeth Peiffer, "The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria," *William & Mary Journal of Women and the Law*, vol. 11, issue 3 (2005), 526; http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1132&context=wmjowl (accessed 27 October 2014).
4. Peiffer, "The Death Penalty," 529.
5. Rudolph Peters, "The Re-introduction of Shariah Criminal Law in Nigeria: New Challenges for the Muslims of the North," *Amsterdam School for Cultural Analysis (ASCA)*, 2004, 15, downloaded from UvA-DARE, the institutional repository of the University of Amsterdam (UvA); http://hdl.handle.net/11245/2.80489 (accessed 28 October 2014).
6. Peiffer, "The Death Penalty," 534.

CHAPTER XXXI

1. http://www.nyulawglobal.org/globalex/Sudan.html (accessed 27 January 2017); see also Akgunduz, *Introduction*, 307.
2. Einas Ahmed, "Political Islam in Sudan: Islamists and the Challenge of State Power (1989–2004)," in Benjamin F. Soares and Rene Otayek, eds., *Islam and Muslim Politics in Africa*, New York: Palgrave Macmillan, 2007, 189–204, 191.
3. Ibid.
4. Mohammed Saeed and Hamza Hendawi, "Pregnant Sudanese woman Sentenced to Death for Marriage to Christian," *The Globe and Mail*, 16 May 2014. See also https://www.thestar.com/news/world/2014/05/15/woman_doctor_sentenced_to_death_for_marrying_christian.html (accessed 26 May 2014); Peters, "The Islamization of Criminal Law," 46–274, 265.
5. Peters, *Crime and Punishment*, 165–166.
6. Qur'an, al-Mā'idah, 5:33.
7. Peters, *Crime and Punishment*, 165–167.
8. Ibid., 166.
9. Peters, "The Islamization of Criminal Law," 265.
10. Ahmed, "Political Islam in Sudan," 189–204, 189.
11. Saeed and Hendawi, "Pregnant Sudanese Woman."
12. Peters, The Islamization of Criminal Law, 254.
13. Peters, *Crime and Punishment*, 168.
14. Sudan: Ban Death by Stoning, https://www.hrw.org/news/2012/05/31/sudan-ban-death-stoning (accessed 3 September 2015).
15. "Yet Another Case of Stoning: Sudan Women Continue to be Caught up in the Chaos," http://www.sudantribune.com/spip.php?article43703 (accessed 3 September 2015).

16. "Pregnant Woman to be Flogged, Hanged for Marrying Christian," http://nypost.com/2014/05/15/pregnant-woman-to-be-flogged-hanged-for-marrying-christian/ (accessed 3 September 2015).
17. http://www.wluml.org/media/stoning-interview-sudanese-human-rights-lawyer-hikma-ahmed (accessed 4 August 2014). See also Saeed and Hendawi, "Pregnant Sudanese Woman."
18. https://www.opendemocracy.net/arab-awakening/walaa-salah/new-amendments-to-sudanese-criminal-law (accessed 25 January 2017).
19. Ibid.

CHAPTER XXXII

1. Mo Salah, *Quelques aspects de la reception du droit français en Mauritanie* (1989), 5 *Revue mauritanienne de droit et d'économie* 25, quoted from *Researching the Legal System and Laws of the Islamic Republic of Mauritania*, http://www.nyulawglobal.org/globalex/Mauritania.html (accessed 10 September 2015).
2. *Legal System of Mauritania*, http://www.country-data.com/cgi-bin/query/r-8563.html (accessed 10 September 2015)
3. Article 60 of the 1961 Constitution of Mauritania states, "Legislation and regulations in force in the Islamic Republic of Mauritania shall remain applicable insofar as they have not been modified by this Constitution."
4. Anthony G. Pazzanita, *Historical Dictionary of Mauritania,* https://books.google.com.my/books?id=-KU_9MfXKKYC&pg=PA201&lpg=PA201&dq=penal+code+of+mauritania&source=bl&ots=nUg_YLPbaS&sig=4W2hhsFMhNibRnNlxvFedQfZ4ic&hl=en&sa=X&redir_esc=y#v=onepage&q=penal%20code%20of%20mauritania&f=false (accessed 14 September 2015).
5. Law Criminalizing Apostasy, http://www.loc.gov/law/help/apostasy/#_ftnref47 (accessed 14 September 2105).
6. Husnu al-Suood, *The Maldivian Legal System*, Maldives: Maldives Law Institute, 2014, 47.
7. Ibid., 49. See also https://en.wikipedia.org/wiki/Maldives (accessed 28 October 2016).
8. Al-Suood, *The Maldivian Legal System*, 49.
9. Ibid., 50–51.
10. See Dhivehi Raajjeyge Ekieki Kankan, *Hingigoiy*, vol. 10 (Records of the Government of Maldives), 2013 (Male, Maldives: Reprinted by Novelty Printers and Publishers), 923–925. See also https://books.google.com.my/books?id=FUHnAgAAQBAJ&pg=PA49&lpg=PA49&dq=legal+and+judicial+reforms+%2B+President+Amin+%2B+Maldives&source=bl&ots=1wIZ6BzGXe&sig=1Q2HPax_roBlLR_ix-Wh1CaWxXw&hl=en&sa=X&redir_esc=y#v=snippet&q=President%20Amin&f=false.

11. Ibid.
12. https://minivannewsarchive.com/politics/comment-new-penal-code-comes-into-effect-a-truly-historic-moment-101000 (article by Hussein Shameem, accessed 30 May 2017).
13. ʿAbd Allāh al-Miṣrī, *Maʿrakat al-Dustūr fīʾl-Yaman: Risālat al-ʿulamāʾ bi-khuṣūṣ mashrūʿ dustūr dawlat al-waḥdah* [The Constitutional Movement in Yemen: Letter from the Ulama regarding the Draft Constitution of the Unitary State], Sanaa, n.d.
14. Law Criminalizing Apostasy, http://www.loc.gov/law/help/apostasy/#_ftn82 (accessed 7 September 2015).
15. Amnesty International Report 1998: Yemen, http://www.refworld.org/docid/3ae6aa014c.html (accessed 2 September 2015).
16. Yemeni Man Sentenced to Hand and Foot Amputation for Armed Robbery; <https://www.amnesty.org/en/press-releases/2013/09/yemeni-man-sentenced-hand-and-foot-amputation-armed-robbery/> (accessed 2 September 2015).
17. Death by stoning and flogging, http://www2.amnesty.se/uaonnet.nsf/dfab8d-7f58eec102c1257011006466e1/f45a9ac5cf75908ac1256c95002cda22?OpenDocument (accessed 7 September 2015).

CHAPTER XXXIII

1. Eugene Cotran and Chibli Mallat, eds., *Yearbook of Islamic and Middle Eastern Law*, London: Kluwers Law International, 1994, 1:543. See also Akgunduz, *Introduction,* 296–297.
2. Law No. 148 of 1972 (Art. 5).
3. Ibid., Article 13.
4. Law No. 70 of 1973 (Art. 2).
5. Law No. 148 of 1972 (Art. 19).
6. Cf. Peters, *Crime and Punishment*, 155.
7. Markus D. Dubber, *The Oxford Handbook of Criminal Law,* https://books.google.com.my/books?id=DE5VBQAAQBAJ&pg=PA264&lpg=PA264&dq=Islamic+criminal+law+in+united+arab+emirates&source=bl&ots=WuBw06r7ex&sig=xd7uUrYFZu4T4FwadZZ6MXS24Fc&hl=en&sa=X&redir_esc=y#v=onepage&q=Islamic%20criminal%20law%20in%20united%20arab%20emirates&f=false (accessed 15 September 2015).
8. Aly Kheder Ahmed, *A Guide to United Arab Emirates Legal System*; <http://www.nyulawglobal.org/globalex/United_Arab_Emirates.htm> (accessed 15 September 2015).
9. https://en.wikipedia.org/wiki/United Arab Emirates (accessed 27 October 2016).
10. https://en.wikipedia.org/wiki/UnitedArabEmirates (accessed 27 October 2016).
11. https://en.wikipedia.org/wiki/Qatar.
12. Ibid.

CHAPTER XXXIV

1. The cases cited involved Muslim and non-Muslim parties in conversion and property disputes. In one case, the son converted to Islam and then he died, and the mother filed the case stating that the son had reverted to his previous religion before he died, but whether a person is a Muslim or not is a shariah issue. She could not bring the case to a shariah court as she was non-Muslim and shariah courts had no jurisdiction over her. As such she had nowhere to go. In another court case over a land dispute, the case involved a non-Muslim and *waqf* charitable endowment, which fell under the shariah court's jurisdiction. The shariah judge would be able to look into the *waqf* issue, but not the land laws, such as adverse possession, estoppels, and indefeasibility of title, as those were beyond the shariah court's jurisdiction. Even if both parties were Muslim, Tun Hamid added, they could resolve only the *waqf* issue but not the land law part—for this is "a matter for Parliament to resolve, not the court, as it involves amending the constitution." See Tun Hamid's views in *New Straits Times* (Kuala Lumpur), 9 December 2016, 20.
2. Muslim, *Mukhtaṣar Ṣaḥīḥ Muslim*, hadith no. 1784, 474.

Glossary

ʿadam al-ghawth: an expression that signifies the victim's helplessness.
adbār (pl. of *dubur*): back, posterior.
ʿām: general, especially words in a legal text that are unspecified as to the scope of their application.
ʿāqil, bāligh: legally an adult and competent person.
aḥādith (pl.of hadith): sayings of Prophet Muḥammad.
aḥkām ūli al-amr: commands of the lawful rulers.
akbar al-kabāʾir: gravest of the major sins.
amānah: trust.
amārāt: circumstantial evidence.
amīn: trustee.
arkān (pl. of *rukun*): pillars.
aṣl: origin, basis, root.
aṣlaḥa: to rectify or reform.
ʿawrah: private parts.
āyah (pl. *āyāt*): lit., sign, usually a verse of the Qur'an.
baghy (or *bugha*) : mutiny, rebellion.
basmah warāthiyyah: DNA (deoxyribonucleic acid).
bawwāb: door keeper.
biḍʿah: Pernicious innovation signifying the opposite of Sunnah, against the established precedent.
biʾı-maʿrūf: according to custom or in a decent manner.
dār al-ḥarb: abode of war.
dhanb: sin.
dhimmī: non-Muslim citizen (now *mawatin*).
dīn Allāh: God's religion.
diya: blood-money.
fāḥishah (or *faḥshāʾ*): immorality, lewdness.

fasād: corruption.
fāsid: legally voidable.
fiqh: lit., understanding, usually Islamic law and jurisprudence.
fitnah: sedition, incitement to crime and rebellion against lawful government.
ghaṣb: usurpation.
ghayr muḥṣan: an unmarried Muslim.
ghayr ʿudūl: of lesser qualification in reference usually to witnesses.
ghulāt: exaggerators, also a group of the Shia.
ḥadd (pl. *ḥudūd*): lit., limit, prescribed punishment in Islamic law for a specified number of offences; it also refers to the offence itself.
hadith: saying of Prophet Muḥammad.
hadr al-dam: bloodshed for no valid cause.
halal: lawful, permissible.
ḥaqq: right, truth, justly deserved.
ḥaqq al-ādamī / ḥaqq al-ʿabd: Right of Man or private right.
ḥaqq Allāh: Right of God, often signifying a public or community right.
ḥarām: forbidden.
ḥikmah : wisdom, balanced judgement.
ḥirābah: highway robbery, terrorism, waging war against the community.
ḥirz: safeguarding or safekeeping.
ʿiddah: probation period a woman must observe following dissolution of her marriage.
īdhāʾ : hurt, any painful act.
ʿiffah: purity of character.
al-ifk: the lie.
iḥṣān: lit., protection, a legal status achieved when a Muslim is lawfully married.
ijmāʿ: general consensus.
ikhtilāf: reasoned disagreement, differential interpretation.
iktilāṭ : ambiguity.
ijmāʿ sukūtī : tacit consensus, as opposed to *ijmaʿ qawlī* (verbal consensus).
ijtihād: lit., striving, intellectual exertion by a qualified scholar, in order to derive the ruling of an issue from the source evidence of shariah.
iḥtimāl : probability.
ikhāfah, irhāb : spreading of fear.
iltibās : confusion.
intiḥār : suicide.
irtidād : apostasy, deliberate renunciation of Islam.
iṣlāḥ : reform, change for the better.
jāhiliyyah : time of ignorance.
jihad : lit., struggle — for a righteous cause, also known as holy war.
jumhūr: dominant majority.

kaffārah : lit. a concealer, expiation, self-imposed punishment.
kāfir : infidel.
khamr : wine obtained specifically from grapes.
Khārijites : lit., outsiders, a sectarian movement that staged an uprising against the caliph ʿAlī in the early days of Islam.
khāṣṣ : specific **(as opposed to a general, *ʿām*) text** or statement that conveys a specific meaning.
khuṣumah : litigation.
liʿān : imprecation, a form of divorce in Islamic law.
liwāṭ : homosexuality/sodomy.
madhhab (pl. *madhāhib*): legal school.
mafsadah : mischief.
maḥram : a close relative.
majhūl : unknown.
makrūh : reprehensible, abominable – as opposed to *mandūb*.
māl mutaqawwim: property with a market value.
maqāṣid al-sharīʿah: the overriding objectives of shariah.
maqdhuf: slandered person/individual.
marīḍ: ill , sick.
maʿsiyah : transgression.
maṣāliḥ ḍarūriyyah : essential interests.
mashhūr : lit., famous, also a well-known variety of hadith.
mashrūʿiyyah : legality.
maṣlaḥah : lawful benefit.
mijn : shield.
milkiyyah : ownership.
mubāḥ : permissible.
mubtadiʿ : pernicious innovator.
mudārib : trade manager.
mufāriq li'l-jamāʿah: one who boycotts the community
muftī jurisconsult, one who is qualified to give a legal opinion or *fatwa*.
muḥarib (pl. *muḥaribīn*): terrorist.
muḥkam : firm, perspicuous, a text usually of the Qur'an that conveys a firm and indisputable meaning.
muḥṣan : a married Muslim.
mujāharah : declaring openly.
mujtahid : one who is qualified to conduct *ijtihād*.
mukallaf : a legally competent person.
muqābil al-azhar : contrary to the manifest position.
murtad : apostate.
musāfir : traveller.

musāḥaqah, also *siḥāq*: lesbianism.
Muʿtazilah : a sectarian movement of early Islam well-known for its rationalist tendencies.
mutawātir : proven by continuous testimony (a variety of hadith).
mutazawwijah : a married woman.
nafs : living soul, self.
naṣhah : sincere advice.
naskh : abrogation of one ruling by another.
nisāb : quorum.
qadhf : slanderous accusation.
qāḍī : judge.
qānūn : statutory law.
Qānūn Jināyat: Islamic Criminal Law.
qarīnah (pl. *qarāʾin*): clue, circumstantial evidence.
qarīnah qāṭiʿah : decisive circumstantial evidence.
qasamah : oath-taking.
qatl: murder.
qaṭʿī : definitive.
qaṭʿ al-ṭarīq: highway robbery/banditry.
qawl al-ṣaḥābi : saying of the companion.
qiṣāṣ : just retaliation.
qiyas : analogy.
rajm : stoning.
ribā : usury, banking interest.
riddah: apostasy.
ṣaḥīḥ : sound, usually of a sound hadith.
saḥq / suḥq : hard contagion, rubbing fiercely without penetration, lesbianism.
sajjān / ḥaddād: prison guard.
ṣabr: patience.
ṣalāh: ritual prayers.
sāriq: thief.
sariqah: theft.
al-sariqat al-kubrā: great robbery.
satr : concealment.
satr al-ʿawrāt: concealing the nakedness of others.
shafāʿah : intercession.
shafāʿah ḥasanah : benevolent intercession.
shak : doubt.
shibh al-ʿaqd : quasi contract.
shirk : association of other deities with God.
shubhāt (pl. *shubha*): doubt, uncertainty.
shurb : (offence of) wine drinking.

siyāsah sharʿiyyah : judicious policy, shariah-oriented policy.
sulṭah taḥakkumiyyah : arbitrary exercise of power.
sunnah : normative conduct and teachings of Prophet Muḥammad.
taʿadhdhur al-iḥtirāz : inability to avoid.
tabʿīd : banishment.
tābiʿi (pl. *tabiʿīn*): successor, the generation immediately after Companions.
tadākhul : amalgamation.
tafsīr : explanation, interpretation usually of Qur'an.
tafsīr bi'l-maʾthūr : *tafsir* based on precedent.
tafsīr bi'l- raʾy : *tafsir* based on opinion.
taghrīb : banishment.
taḥakkumiyyah: arbitrary ruling.
taḥrīm : prohibition.
taʾkhīr : delay.
takhṣīṣ al-ʿām: specification of the general.
taqādum : expiry, expiration due to lapse of time.
taqlīd : indiscriminate imitation.
taqlīdī: imitationist.
taʾwīl : plausible interpretation.
tawbah : repentance.
tawḥīd : monotheism, belief in the Oneness of God.
taʿzīr : deterrent punishment.
taʿzīrāt (plural of *taʿzīr*): deterrent penalties.
ʿulamāʾ (sing. *ʿālim*): Eng. ulama: scholars, learned persons.
ūli al-amr: persons charged with authority.
ummah: Muslim community, fraternity of believers.
ʿuqūbah : punishments.
uṣūl al-fiqh : science of the sources and proofs of Islamic Law.
wājib : obligatory.
wilāyah: guardianship.
walī (pl. *awliyāʾ*): guardian, supporter.
walī al-dam: next of kin.
wuḍūʾ: ablution.
zakat: poor due.
zānī : adulterer.
ẓannī : speculative.
ẓihār : a form of divorce in Islamic Law.
zinā: adultery and fornication.
zinā bi'l-maḥārim : incest.
zindīq : heretic.

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